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No. _____

In The

Supreme Court of the United States

October Term, 1986

MATT MYSLAKOWSKI,
Individually and as Next Friend
of MARIE MYSLAKOWSKI, a Minor,
and
BETTY GALANOS,
Personal Representative of the Estate
of TINA MARIE KELLY, Deceased,
Petitioners,

v

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDIX –

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QUESTIONS PRESENTED FOR REVIEW

I.

DID THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERR IN FAILING TO STRICTLY CONSTRUE AND APPLY THE PRINCIPLES OF *DALEHITE* v *UNITED STATES*, 346 US 15 (1953) AND *UNITED STATES* v *S A EMPRESSA DE VIACAO ÆREA RIO GRANDENSE ("VARIG AIRLINES")*, 467 US 797 (1984) BY HOLDING THAT THE DISCRETIONARY FUNCTION EXCEPTION, EMBODIED IN 28 U.S.C. 2680(a), BARRED THE PETITIONERS' CLAIMS THAT THE GOVERNMENT AS A SELLER OF USED GOODS, *I.E.*, JEEPS USED AS DELIVERY VEHICLES BY THE UNITED STATES POSTAL SERVICE, WAS LIABLE TO THEM FOR FAILING TO WARN ALL FORESEEABLE USERS OF THE JEEPS' PROPENSITY TO ROLL OVER AT LOW SPEEDS IF USED AS PASSENGER VEHICLES WHEN THE GOVERNMENT HAD KNOWLEDGE OF THAT DANGER, PRIOR TO THE TIME THE JEEPS WERE SOLD, AND IT WAS FORESEEABLE THAT THE JEEPS WOULD BE PURCHASED FOR USE AS PASSENGER VEHICLES, AND NEITHER WEIGHED AND BALANCED POLICY FACTORS RELEVANT TO MAKING A DECISION ABOUT WHETHER A WARNING SHOULD BE ISSUED, NOR ACTUALLY MADE A DECISION THAT A WARNING SHOULD NOT BE ISSUED BEFORE THE JEEPS WERE SOLD, WHEN ITS FAILURE TO MAKE A DECISION DID NOT IMPACT ON ANY SOCIAL, ECONOMIC OR POLITICAL POLICY OF GOVERNMENT?

II.

DID THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERR IN RULING THAT IT WAS IMPROPER FOR THE DISTRICT COURT TO APPLY A BIFURCATED DISCRETIONARY/OPERATIONAL ANALYSIS TO SUPPORT ITS HOLDING THAT THE GOVERNMENT AS A SELLER OF USED GOODS WAS ENGAGED IN THE PERFORMANCE OF NONDISCRETIONARY OPERATIONAL ACTIVITY WHEN IT FAILED TO WARN ALL FORESEEABLE USERS OF THE JEEPS'

PROPENSITY TO ROLL OVER AT LOW SPEEDS WHEN USED AS PASSENGER VEHICLES, FOR THE REASON THAT THE GOVERNMENT HAD KNOWLEDGE OF THAT DANGER PRIOR TO THE TIME IT IMPLEMENTED ITS DECISION TO SELL THE JEEPS TO MEMBERS OF THE GENERAL PUBLIC, AND IT KNEW OR SHOULD HAVE KNOWN THAT PURCHASERS OF THE JEEPS WOULD USE THEM AS PASSENGER VEHICLES?

III.

DID THE SALE OF USED GOODS ON AN "AS IS" BASIS CONSTITUTE A DEFENSE TO A NEGLIGENCE ACTION UNDER THE FEDERAL TORT CLAIMS ACT WHEN THE SUBSTANTIVE RULES OF DECISION ARE SUPPLIED BY THE LAW OF THE STATE OF MICHIGAN?

LIST OF PARTIES

THE PARTIES TO THE PROCEEDINGS BELOW WERE THE PETITIONERS, MATT MYSLAKOWSKI, INDIVIDUALLY AND AS NEXT FRIEND OF MARIE MYSLAKOWSKI, A MINOR, AND BETTY GALANOS, PERSONAL REPRESENTATIVE OF THE ESTATE OF TINA MARIE KELLY, DECEASED, AND THE RESPONDENT, UNITED STATES OF AMERICA.

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No. _____

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MATT MYSLAKOWSKI,
Individually and as Next Friend
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The Petitioners, Matt Myslakowski, individually, and as Next Friend of Marie Myslakowski, and Betty Galanos, Personal Representative of the Estate of Tina Marie Kelly, deceased, respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on November 26, 1986.

REPORTS OF OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit is reported at 806 F2d 94 and is reprinted in the appendix hereto, p A-1, *infra*.

The Memorandum Decision of the United States District Court for the Eastern District of Michigan (Cook, D.J.) is reported at 608 F Supp 360 and is reprinted in the appendix hereto, p B-1, *infra*.

STATEMENT OF JURISDICTIONAL GROUNDS

Invoking federal jurisdiction under 28 U.S.C. 1346, the Petitioners brought suit under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* in the Eastern District of Michigan. Their cases were consolidated for purposes of discovery and trial. After a trial, Petitioner, Matt Myslakowski, individually, and as Next Friend of Marie Myslakowski, a minor, was awarded the sum of $350,000.00, exclusive of costs, interest and attorneys fees, and Petitioner Betty Galanos, Personal Representative of the Estate of Tina Marie Kelly, deceased, was awarded the sum of $550,000.00, exclusive of costs, interest and attorneys fees, on April 29, 1985 by the Honorable Julian A. Cook, Jr.

The Respondent appealed appealed pursuant to 28 U.S.C. 1291, and on November 26, 1986, the Sixth Circuit entered an Opinion reversing the Judgment of the District Court for the reason that the discretionary function exception embodied in 28 U.S.C. 2680(a) barred the Petitioners' claims against the Government, and thus Petitioners' cases had to be dismissed for lack of subject matter jurisdiction. No petition for rehearing was sought.

The jurisdiction of this Court to review the Judgment of the Sixth Circuit is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Statutes involved in this case are 28 U.S.C. 2680 (a) and MCLA 440.2316. (These Statutes are set forth in Appendices C and D, *infra*).

CONCISE STATEMENT OF THE CASE

These cases arise out of an accident that occurred in Shelby Township, Michigan, on October 13, 1979, when a ten (10) year old, one-quarter (¼) ton delivery truck, a Jeep Dispatcher 100, Model DJ-5A, owned by Robert Pace and driven by Renee Pace, his seventeen (17) year old daughter, rolled over and collided with another vehicle killing Tina Marie Kelly and causing serious neurological injuries to Marie Myslakowski, who were passengers in the Pace jeep. The jeep had been sold as surplus property by the United States Postal Service in 1975 to John Greenway, who sold it to Peter Plummer, who sold it to Robert Pace in August of 1979. Petitioners submitted a claim to the United States Postal Service as required by 28 U.S.C. 2675, seeking compensation for the injuries to their children. Their claims were denied.

Petitioners then filed separate suits against the United States in the United States District Court for the Eastern District of Michigan under the Federal Tort Claims Act, 28 U.S.C. 2671-2680, pursuant to 28 U.S.C. 1346. Their cases were consolidated for the purposes of discovery and trial. Petitioners alleged that the Government was negligent in (1) selling the jeeps in question to the general public; (2) failing to affix proper warnings to the jeeps advising users of the jeep that they were not fit for use as passenger vehicles because the Government was aware prior to the time it sold the jeeps, that when compared with most passenger vehicles, the jeeps had a

high propensity to roll over while being operated at speeds of eighteen (18) to twenty-two (22) miles per hour; (3) designing the vehicle with a low rollover resistance.

There is nothing in the record to indicate that the Government's failure to warn members of the public of the jeeps' propensity to roll over when used as passenger vehicles resulted from the exercise of discretion by anyone weighing and balancing policy factors involving room for policy judgment with regard to how a decision not to warn members of the public of the danger of using the jeeps as passenger vehicles would impact upon any social, economic or political policy arising out of the process of governing. The Government failed to establish that discretion was exercised and a decision not to warn was made after consideration of relevant policy factors or that the failure to make a decision not to warn involved the exercise of discretion or had any impact upon any social, economic or political policy arising out of the process of governing.

On April 29, 1985, the District Court, in a Memorandum Opinion reported at 608 F Supp 360, held that the Government was not liable under a negligent design theory because the Petitioners had not established by a preponderance of the evidence that the Government was responsible for the design of the jeep. (p B-10, *infra*). The District Court held that the Government was not liable for its decision to offer the jeeps for sale to the general public. The decision to sell the jeeps was clearly a policy-based discretionary function within the purview of the statutes and regulations which permit the Government, as part of its economic need to operate efficiently, to recoup some of its expenditures by selling surplus goods. (pp B-11–B-27, *infra*). Exposing the Government to liability solely for a decision to sell surplus property

would improperly impede the performance of a governmental function and place the judiciary in the position of second-guessing policy decisions which had been properly delegated to another branch of Government. (pp B-11 – B-27, *infra*). The District Court held that the Government's actions in selling the jeeps "as is" and not warning subsequent purchasers and users of the dangers of using the jeeps as passenger vehicles did not involve the exercise of a "discretionary function" within the discretionary function exception embodied in 28 U.S.C. 2680(a) of the Federal Tort Claims Act because the Government did not make a policy-type decision not to give users of the jeeps a warning of the dangers of using the jeeps as passenger vehicles when there was readily ascertainable data documenting the existence of that danger. (pp B-25 – B-33, *infra*).

The United States Court of Appeals for the Sixth Circuit reversed the decision of the District Court on November 26, 1986, in a written Opinion published at 806 F2d 94, for the reason that the discretionary function exception embodied in 28 U.S.C. 2680(a) barred the Petitioners' claims against the Government and deprived the District Court of subject matter jurisdiction to hear those claims. In reaching that conclusion, the Sixth Circuit held that the District Court erred in ruling that the discretionary function exception did not apply when the evidence established that the Government did not evaluate the policy pros and cons of deciding whether to warn users of the jeeps of their propensity to roll over when used as passenger vehicles and did not exercise its discretion to make a decision not to give any warnings. (p A-8, *infra*). The Sixth Circuit held that the negligent failure of the Government to either weigh and balance all relevant aspects of the decision to issue a warning advising foreseeable users of the jeeps of the dangers of using them as passenger vehicles or to make a decision

not to warn of those dangers were discretionary acts encompassed in the Government's decision to sell the jeeps. (p A-8, *infra*). Otherwise, the Government could be held liable for judgment-based policy decisions made at the highest levels of Government upon a showing that the decision makers made the decision without considering important relevant aspects of the decision or if the decision was negligently arrived at. (pp A-8–A-11, *infra*). If either of those scenarios occurred, the Sixth Circuit reasoned that the discretionary function exception would not bar any claim where the negligent failure to consider a relevant risk during the exercise of discretion could be proven. (p A-11, *infra*).

In reaching its decision, the Sixth Circuit did not cite or apply the principles of *Dalehite* v *United States*, 346 US 15 (1953), the leading case interpreting 28 U.S.C. 2680(a).

In citing *United States* v *SA Empressa De Viacao Aerea Rio Grandense ("Varig Airlines")*, 467 US 797 (1984), the Sixth Circuit indicated that judicial intervention in governmental decision making through the medium of tort suits would require the judiciary to "second-guess" the political, social and economic judgments of Government in the exercise of its regulatory functions. It was precisely that type of judicial intervention that the discretionary function exception was designed to prevent. (p A-10, *infra*).

Lastly, the Sixth Circuit noted that three (3) other courts had considered "the very question we address today" in connection with accidents involving the same type of jeep vehicles and had reached the same conclusion as the Sixth Circuit. The Sixth Circuit, unlike the District Court, failed to note that the jeeps in the three (3) other cases were not being used as passenger vehicles when their operators were injured.

The Sixth Circuit ignored twenty (20) cases cited by the Petitioners to support the District Court's holding that the Government's conduct was operational and did not involve the exercise of discretion when it was aware of dangers to the public arising out of a governmental decision to pursue a particular course of action prior to the time the decision was implemented and failed to warn the public of the dangers they might be exposed to when the Government implemented its decision.

In reaching its decision, the Sixth Circuit permitted an implied warranty "as is" defense to be used to defeat Petitioners' claims of negligence. The Sixth Circuit cited no authority allowing a lawsuit to be brought or defended under a theory of implied warranty under the Federal Tort Claims Act, when Michigan law, which provided the substantive rules of decision, does not permit a seller of used goods to use an implied warranty "as is" defense to relieve himself of the duty to use due care under a theory of negligence under the Federal Tort Claims Act.

REASONS FOR GRANTING THE WRIT

I.

THE SIXTH CIRCUIT ERRED IN FAILING TO STRICTLY CONSTRUE AND APPLY THE PRINCIPLES ENUNCIATED BY THIS COURT IN *DALEHITE* v *UNITED STATES*, 346 US 15 (1953) AND *UNITED STATES* v *SA EMPRESSA DE VIACAO ÆREA RIO GRANDENSE ("VARIG AIRLINES")*, 467 US 797 (1984), TO THE FACTS OF THIS CASE.

Petitioners' cases present this Court with the unique opportunity to decide whether the "discretionary function" exception, created by the enactment of 28 U.S.C. 2680(a), can be used as a defense under the Federal Tort

Claims Act to bar a claim for negligence when the Government, acting in a proprietary nongovernmental role of a merchant selling used goods, *i.e.*, jeeps used as Postal Service delivery vehicles and not as a regulator of the conduct of private individuals, neither used its judgment and discretion to weigh and balance policy factors concerning whether users of the jeeps should be warned that they have a propensity to roll over at low speeds when used as passenger vehicles, nor actually made a decision after planning and considering whether to warn of those dangers in spite of the fact that the Government was aware of the existence of those dangers and knew or should have known the jeeps would be used as passenger vehicles prior to the sale of the jeeps.

In *Dalehite*, the Government was found to be immune under the "discretionary function" exception embodied in 28 U.S.C. 2680(a). In determining that the Government was being sued for acts arising from the perforance of discretionary activity, *Dalehite* held that Congress, by its enactment of 28 U.S.C. 2680(a), had expressed an intention to protect the Government from claims, however negligently caused, that affected governmental functions. (*Dalehite* at p 31). Thus, the exception barred the use of a suit in tort to test the legality of statutes and regulations or the exercise of discretion in the performance of governmental functions or duties even if the discretion being exercised was abused. (*Dalehite* at p 32). The discretion being protected is the right of the Government, through its employees, to perform governmental functions or duties, to act or exercise its judgment to pursue what it believed was the best course of action without being subjected to judicial second-guessing. (*Dalehite* at p 34). In *Dalehite*, the need for the Government to engage in further experimenting and testing of the commodity FGAN involved the exercise of discretion because the Government had manufactured

and shipped it for more than three (3) years without experiencing even a minor accident. (*Dalehite* at p 38). FGAN was manufactured in accordance with and done under specifications and directions drafted by the office of the Field Director of Ammunition Plants in light of the prior experience that private enterprise and the TVA had with FGAN before the Government began production of FGAN. (*Dalehite* at p 38). The establishment of the plan required the exercise of expert judgment and the considerations impacting upon the decisions which were made were those crucial to the feasibility of the program itself, balanced against the present knowledge and general custom of private industries involved in the manufacture and distribution of FGAN. (*Dalehite* at p 40). Thus, the decisions which were made required the consideration of a vast spectrum of factors, some of which directly involved the feasibility of continuing the program to manufacture and distribute FGAN, *i.e.*, adopting certain manufacturing methods would result either in greatly increased production costs and/or greatly reduced production. (*Dalehite* at p 40). It was exactly that type of judicial questioning of a decision involving serious room for the exercise of policy judgment that is barrred by the "discretionary function" exception embodied in 28 U.S.C. 2680(a). (*Dalehite* at p 40). Because the governmental decisions liability was premised upon were all made at a planning rather than an operational level and involved considerations more or less important to the practicability of the Government's program, the claims against the Government were barred by the discretionary function exception.

In *United States* v *SA Empressa De Viacao Aerea Rio Grandense ("Varig Airlines")*, 467 US 797 (1984), this Court indicated that *Dalehite* still represented a valid interpretation of the discretionary function exception. (*Varig Airlines* at p 812). This Court then isolated several

factors which would be useful in determining whether the Government was entitled to receive the protection of 28 U.S.C. 2680(a). (*Varig Airlines* at p 813). First, it is the type of conduct, rather than the status of the actor, which determines whether the discretionary function exception serves as a bar to the bringing of suit in any given case, *i.e.*, whether Government actions are of the nature and quality that Congress intended to shield from tort liability. (*Varig Airlines* at p 813). Second, no matter what else the discretionary function exception may include, it clearly was intended to encompass the discretionary acts of government acting in its role as a regulator of the conduct of private individuals. (*Varig Airlines* at p 814). The emphasis upon protecting government from liability for its regulatory activities suggests that Congress, in creating an exception for the Government's exercise of discretion, wished to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort. (*Varig Airlines* at p 814). In fashioning an exception for discretionary governmental functions and duties, including regulatory activities, Congress acted to protect the Government from an imposition of liability that would seriously handicap the efficient operation of government. (*Varig Airlines* at p 814). This Court held that a federal agency is engaged in the most basic kind of discretionary regulatory activity when it determines the extent to which it will supervise the safety procedures of private individuals. (*Varig Airlines* at pp 819-820). Decisions concerning the manner in which regulations will be enforced directly impact upon the feasibility and practicality of any regulatory program because those decisions require the agency to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as

staffing and funding. (*Varig Airlines* at p 820). Judicial intervention in such decision making through the medium of a tort suit would require the courts to "second-guess" the political, social and economic judgments of any agency performing regulatory functions. (*Varig Airlines* at p 820). It was precisely that sort of judicial intervention in policy making that the discretionary function exception was designed to prevent. (*Varig Airlines* at p 820).

The principles enunciated in *Dalehite* do not bar the Petitioners' claims against the Government.

In deciding what to do with the jeeps, the Government was engaged in the performance of a governmental function or duty. The District Court recognized this when it ruled that the Government could not be held liable for exercising its discretion and deciding to sell the jeeps. Once the Government decided to sell the jeeps, however, it was acting as a merchant in a proprietary nongovernmental capacity, and, thus, it could not claim it was engaging in the performance of a discretionary governmental function or duty for which it could not be held liable when it failed to warn users of the dangers of using the jeeps as passenger vehicles when it knew the jeeps posed that danger prior to offering the jeeps for sale on an "as is" basis.

When the Government is pursuing a proprietary rather than a regulatory objective, the discretionary function exception will not bar a suit against the Government. *McMichael* v *United States*, 751 F2d 303 (8th Cir, 1985).

The principles enunciated in *Dalehite* were that in order for the discretionary function exception to apply, there must be planning and/or a weighing and balancing so that the policy judgment and decision is the product

of serious judgment that is made after consideration of the relevant factors. There was no evidence of planning and/or of a weighing and balancing of factors by the Government of a decision to not have warnings on the jeeps it sold when the Government knew prior to the time it sold the jeeps that the jeeps would be used by purchasers as passenger vehicles and that the jeeps were dangerous when used as passenger vehicles.

The Government, as a seller of used goods, *i.e.*, the jeeps, was aware of the dangers of using the jeeps as passenger vehicles prior to the time it offered the jeeps for sale and did nothing to examine the dangers and weigh and balance those dangers against possible courses of action, and how each course of action would impact upon the social, economic and political policies of the Government, because in its proprietary non-governmental role as a seller of used jeeps, it failed to use due care and to warn users of the jeeps' known dangers.

The failure to warn users of the jeeps' dangerous propensities did not result from the establishment of a plan requiring the exercise of expert judgment or discretion. If this Court would find that the Government was performing a governmental duty or function and made a decision not to warn users of the jeeps' dangerous propensities when used as a passenger vehicle, that decision did not involve an exercise of discretion weighing or balancing any factors crucial to the continued feasibility of the program of selling the jeeps against the present knowledge and general custom and practice of private merchants involved in the sale of new and used jeeps.

The feasibility of the Government's program would not have been affected if the Government had warned users of the dangers of using the jeeps as passenger

vehicles. The Government still could have offered the jeeps for sale as delivery vehicles and could have sold them to anyone who had been warned about the dangers of using them as passenger vehicles and decided to purchase one for use as a delivery vehicle.

Because the decisions to sell the jeeps without warnings were not made at a planning level during the performance or discharge of governmental functions or duties and did not involve considerations more or less important to the practicability of the Government's economic, social or political programs, Petitioners' claims against the Government are not barred by the discretionary function exception embodied in 28 U.S.C. 2680(a).

The principles enunciated in *Varig Airlines* do not bar the Petitioners' claims against the Government.

The nature of the Government's conduct in this case is that of a seller of used goods. The Federal Tort Claims Act makes it clear that Congress did not intend to shield the Government from tort liability when it engages in the act of selling used goods.

28 U.S.C. 2674 in pertinent part reads:

> "The district court . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury, or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred . . ."

The District Court examined Michigan law and concluded that:

> "Under Michigan law, a seller of used goods has a duty to future and foreseeable users of the product to exercise the reasonable care required of a reasonably prudent seller under the existing circumstances, *Johnson* v *Purex Corp*, 128 Mich App 736, 341 NW2d 198 (1983). This duty includes a duty to relate information as to the character and condition of the chattel which he [seller] should recognize as necessary to enable the prospective user to realize the dangers of using it. *Elkins* v *United States*, 307 F Supp 700 (WD Va 1969). This duty applies to dealers in used goods, see *Blanchard* v *Monical Machine Co*, 84 Mich App 279, 269 NW2d 564 (1978), as well as to one time sellers of used products, *Bevard* v *Ajax Manufacturing Co*, 473 F Supp 35 (ED Mich 1979). While this Court has already noted that the 'as is' disclaimer may exclude liability under a theory of implied warranty, the designation of the sale as being on an 'as is' basis does not relieve the seller of his duty of care, under a theory of negligence, *Blanchard*, supra, 84 Mich App at 283, 269 NW2d 564." *Galanos* v *United States*, 608 F Supp 360, 374 (ED Mich 1985).

There is nothing in the Government's conduct as a seller of used goods that involved the Government's role as a regulator of the conduct of private individuals.

Varig Airlines is consistent with the idea that by creating an exception for discretionary governmental functions, including government regulation of the conduct of private individuals, Congress took steps to protect the Government from the liability that would seriously handicap its operation if misgovernment was permitted to become an actionable tort.

Ordinary "garden variety" negligence does not by any means represent "second-guessing" of legislative and

administrative decisions grounded in social, economic and political policy through the medium of an action in tort. *Chotin Transp Inc* v *United States*, 784 F2d 206 (6th Cir, 1986).

Petitioners submit that the Government, in its proprietary nongovernmental roles as a seller of used goods, was guilty of ordinary garden variety negligence for which it is liable, and not misgovernment, when it failed to warn users of the jeeps of the danger of using them as passenger vehicles.

The Government's actions in failing to warn users of the jeeps of their dangerous propensities when used as passenger vehicles neither involved any agency decision as to the manner in which its regulations would be enforced nor directly impacted upon the feasibility and practicability of an agency's regulatory programs by forcing an agency to establish priorities involving the accomplishment of policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding.

Thus, the District Court was not "second-guessing" the political, social or economic judgments of an agency exercising its regulatory function.

In adopting the Government's interpretation of *Varig Airlines*, the Sixth Circuit has radically extended *Varig* to mean that whenever the questioned governmental conduct involves a regulation, it is per se discretionary to private tort actions.

The presence of a governmental choice does not mean that discretion was exercised. For a choice to be discretionary, it must be related to the social, economic and political processes of governing. *Collins* v *United States*, 783 F2d 1225 (5th Cir, 1986). That is consistent with the idea that the discretionary function exception does not

automatically render the Government immune from all governmental decisions which inflict injury upon a party. *Drake Towing Co* v *Meisner Marine Const Co*, 765 F2d 1660 (11th Cir, 1985). The failure to warn of the dangers of using the jeeps as passenger vehicles was not related to the social, economic and political processes of governing.

The discretionary function exception only insulates the Government from mistakes of judgment arising out of significant policy and political decisions. *Miller* v *United States*, 480 F Supp 612 (E D Mich 1979). When the Government knows of the dangers of using the jeeps as passenger vehicles prior to the time they were sold, its failure to warn of those dangers does not arise out of significant policy and political decisions.

The decision of the Sixth Circuit in this case improperly permits the Government to use the discretionary function exception embodied in 28 U.S.C. 2680(a) to shield itself from liability for any decision made or unmade, regardless of whether there has been a weighing and balancing by the decision maker of whether his decision is required by, arises out of, or will have an impact upon any economic, social or political policy arising out of the processes of governing.

II.

THE SIXTH CIRCUIT'S RULING THAT THE DISTRICT COURT ERRED IN APPLYING A BIFURCATED DISCRETIONARY/ OPERATIONAL ANALYSIS TO IMPOSE LIABILITY UPON GOVERNMENT IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

The District Court held that the Government's decision not to warn subsequent purchasers and users of the jeeps that the jeeps had a propensity to roll over at low

speeds when used as passenger vehicles did not involve the exercise of a discretionary function because in deciding to sell the jeeps "as is," the Government's conduct was operational, *i.e.*, it involved activity concerning the manner and methods used to implement the Government's discretionary decision to sell the jeeps. (pp B-27 – B-31, *infra*).

The Sixth Circuit reversed, holding that the Government's decision to sell the jeeps and then selling the jeeps "as is" were all part of the discretionary decision to dispose of the jeeps by selling them.

In reaching that conclusion, the Sixth Circuit totally ignored the planning/operational distinction recognized by this Court in *Dalehite* and twenty (20) cases cited in the Petitioners' Brief which stand for the proposition that the Government's conduct is operational and is not immune from suit when it implements a discretionary decision, is aware of dangers to the public arising from the implementation of that decision prior to the time the decision is implemented, and fails to warn the public of the dangers it may be exposed to by the Government's implementation of the discretionary decision. See *Molsbergen* v *United States*, 757 F2d 1016 (9th Cir, 1985), petition for cert. dismissed 54 USLW 3178 (Oct. 1, 1985) (No. 85-209), (the failure to warn a former serviceman of the effects of radiation after the Government became aware of them held to state a claim under the Federal Torts Claims Act); *Davis* v *United States*, 716 F2d 418 (7th Cir, 1983), (holding that the Government, as the owner and operator of a wildlife refuge containing a rocky lake, had a duty to warn swimmers of subsurface rocks in the lake); *McCormick* v *United States*, 159 F Supp 920 (D Minn 1958), (failure to warn painter that electricity had not been shut off in a government barracks); *United States* v *White*, 211 F2d 79 (9th Cir, 1954), (failure to warn that

some of the spent ammunition being collected as scrap at an army firing range was live); *Epps* v *United States*, 187 F Supp 584 (E D SC 1960), (failure to warn of the existence of a high voltage electrical line during the construction of a government dam); *Fritz* v *United States*, 216 F Supp 156 (D ND 1963), (failure to post adequate warnings that coyote getters had been placed in an area used for hunting); *Hulet* v *United States*, 328 F Supp 335 (D Idaho 1971), (failure to give adequate warnings about the dangers of falling rocks to visitors at a national park); *Worley* v *United States*, 119 F Supp 719 (D Or 1952), (failure to post warnings that poison-ejecting devices had been set out for coyotes); *Driscoll* v *United States*, 525 F2d 136 (9th Cir, 1975), (failure to install appropriate warnings, traffic control devices, and crosswalks on an army base); *Morris* v *United States*, 585 F Supp 1543 (W D Mo 1984), (failure to disclose that an earthen berm had been constructed across a reservoir roadway, and that the roadway was closed); *Allen* v *United States*, 588 F Supp 247 (D Utah 1984), (failure to warn of the dangers of radiation and the methods of preventing its consequences); *Stephens* v *United States*, 472 F Supp 998 (N D Ill 1979), (failure to warn swimmers of submerged tree stumps in a lake created by the Army Corps of Engineers); *Claypool* v *United States*, 98 F Supp 702 (S D Cal 1951), (failure to warn of the dangers of sleeping in a tent in a national park); *Estate of Callas* v *United States*, 682 F2d 613 (7th Cir, 1982), (failure to warn boaters of the dangers associated with a lock and dam constructed by the Government); *Smith* v *United States*, 546 F2d 872 (10th Cir, 1976), (failure to warn of the dangers presented by a thermal pool at a national park); *Hardy* v *United States*, 187 F Supp 756 (E D SC 1960), (failure to warn that there were only 13 feet between an electric powerline and a roadway); *Hernandez* v *United States*, 112 F Supp 369 (D Hawaii 1953), (failure to warn

of the presence of a roadblock in a government highway open to the public); *Andrulonis* v *United States*, 593 F Supp 1336 (N D NY 1984), (failure to warn of the known hazards of an oral vaccine used to immunize wildlife against rabies); *Medley* v *United States*, 543 F Supp 1211 (N D Cal 1982), (failure to warn of the presence of a blind canyon near the only mountain pass route on an aeronautical chart); *Jennings* v *United States*, 291 F2d 880 (4th Cir, 1961), (failure to remove or warn of a patch of ice on a defective roadway maintained by the Government); *Lindgren* v *United States*, 665 F2d 978 (9th Cir, 1982), (failure to warn that a government-operated dam had lowered the water level in a river used for water skiing).

Since filing their Brief on Appeal to the Sixth Circuit, the Petitioners are aware of at least one other post-*Varig Airlines* case which has upheld the use of a bifurcated operational/discretionary analysis to impose liability upon the Government for failing to warn of known dangers arising out of the implementation of a discretionary decision. *Coates* v *United States*, 612 F Supp 592 (D C Ill 1985), (failure of the Government to give campers in a national park adequate warning of the dangers arising from a failed dam).

Dalehite and the aforementioned twenty-one (21) cases clearly conflict with the Sixth Circuit's holding that the Government is immune from suit when it decides not to warn the public of known dangers arising from its operational implementation of a discretionary decision because the decision not to warn, even if not made after the weighing and balancing of how the factors of any decision not to warn would impact upon the economic, social or political policies arising out of the processes of governing by implication relates back to and becomes part of the discretionary decision authorizing the activity which created the need for the warning.

III.

THE SALE OF USED GOODS ON AN "AS IS" BASIS DOES NOT CONSTITUTE A DEFENSE TO A NEGLIGENCE ACTION UNDER THE FEDERAL TORT CLAIMS ACT WHEN THE SUBSTANTIVE RULES OF DECISION ARE SUPPLIED BY THE LAW OF THE STATE OF MICHIGAN.

Petitioners were not allowed to bring a lawsuit based upon a theory of implied warranty under the Federal Torts Claims Act. Therefore, the Government cannot use an implied warranty "as is" defense to defeat Petitioners' claims of negligence.

Pursuant to 28 U.S.C. 2674, the Government is liable to the Petitioners if a private person would be liable to them in an action for negligence under the law of the State of Michigan.

In *Dalehite,* this Court ruled that the enactment of the Federal Tort Claims Act only waived the immunity of the Government to the extent that its liability is predicated on a theory of negligence. It does not permit imposing liability on the Government without a finding of negligence or fault.

Liability under the doctrine of implied warranties of fitness does not embrace the concept of negligence or fault. *Piercefield* v *Remington Arms Co,* 375 Mich 85 (1965).

MCLA 440.2316(3)(a) indicates that all implied warranties are eliminated by the disclaimer "as is." Thus, an "as is" disclaimer would constitute a defense to an action based only upon a breach of an implied warranty.

Under Michigan law, an "as is" disclaimer does not relieve a seller of used goods of the duty to use due care under a theory of negligence. *Blanchard* v *Monical Machine Co; Bevard* v *Ajax Manufacturing;* and *Parsonson* v *Const Equip Co,* 18 Mich App 87 (1969). Included in the

duty of care imposed upon a seller of used goods is the duty to relate all information with regard to the character and condition of the goods being sold, including any information prospective users would need to recognize the dangers of using the goods. *Blanchard*; *Bevard*.

The aforementioned reasoning clearly establishes that an "as is" defense cannot be used to defeat a claim of negligence under the Federal Tort Claims Act when the substantive rules of decision are supplied by the law of the State of Michigan.

CONCLUSION

For the aforementioned reasons, this Petition for Writ of Certiorari should be granted. If the Petitioners are correct in urging that the Sixth Circuit erred in ruling that the discretionary function exception embodied in 28 U.S.C. 2680(a) barred their claims against the Government, Petitioners' cases should be remanded to the District Court for disposition in accordance with the Memorandum Opinion issued by the District Court.

RELIEF REQUESTED

WHEREFORE, Petitioners, Matt Myslakowski, individually and as Next Friend of Marie Myslakowski, a minor, and Betty Galanos, Personal Representative of the Estate

of Tina Marie Kelly, deceased, request this Court enter an Order reversing the decision of the Circuit Court.

Respectfully submitted,

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Dated: February 19, 1987

APPENDICES

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APPENDIX A

OPINION
Reported at 806 F.2d 94 (6th Cir. 1986)

(United States Court of Appeals for the Sixth Circuit)

(Argued August 15, 1986; Decided November 26, 1986)

(Matt MYSLAKOWSKI, Individually and as Next Friend of Marie Myslakowski, a Minor (85-1527), and Betty Galanos, as Personal Representative of the Estate of Tina Marie Kelly, Deceased (85-1528), Plaintiffs-Appellees, v. UNITED STATES of America, Defendant-Appellant — Nos. 85-1527, 85-1528)

Individuals brought personal injury and wrongful death actions resulting from accident involving jeep sold by Post Office Department. The United States District Court for the Eastern District of Michigan, 608 F.Supp. 360, Julian Abele Cook, Jr., J., entered judgment for plaintiffs, and Government appealed. The Court of Appeals, Ryan, Circuit Judge, held that Government was immune from liability for the negligence associated with sale of jeep by United States Postal Service under discretionary exception to Federal Tort Claims Act.

Reversed.

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1. ***United States ☞78(12)***

Government's waiver of sovereign immunity under Federal Tort Claims Act does not apply when challenged act or omission involves discretionary function or duty. 28 U.S.C.A. §§ 1346(b), 2680.

2. ***United States ☞78(12)***

Even the negligent failure of a discretionary Government policymaker to consider all relevant aspects of a subject matter under con-

sideration does not vitiate the discretionary character of the decision that is made, for the purpose of immunity from liability under discretionary function exception to waiver of liability under Federal Tort Claims Act. 28 U.S.C.A. §§ 1346(b), 2680.

3. United States ☞78(12)

Government was immune from liability for any negligence in failing to warn of the rollover propensity of jeeps sold pursuant to Post Office Department's policy decision to sell surplus jeep vehicles on "as is where is" basis, under discretionary function exception to waiver of liability for tortious acts in Federal Tort Claims Act. 28 U.S.C.A. §§ 1346(b), 2680.

Ellen G. Ritteman, Asst. U.S. Atty., Detroit, Mich., Gary M. Maveal, Asst. U.S. Atty. (argued), John P. Schnitker, Robert S. Greenspan, U.S. Dept. of Justice, Washington, D.C., for defendant-appellant; Allen S. Miller, Gary C. Berger, Detroit, Mich., Mikael G. Hahner (argued), for plaintiffs-appellees.

Before ENGEL, KRUPANSKY and RYAN, Circuit Judges.

RYAN, Circuit Judge.

These are personal injury and wrongful death actions brought under the Federal Tort Claims Act, 28 U.S.C. § 1346(b). The district court entered judgment for the plaintiffs after rejecting the government's contention that it was entitled to immunity under the discretionary function exception to governmental tort liability in 28 U.S.C. § 2680(a). We reverse.

I.

These cases arise out of an accident that occurred on October 13, 1979, when a jeep motor vehicle, owned by Robert Pace and formerly owned by the United States Postal Service, collided with another vehicle and rolled over, killing one of the occupants of the Pace vehicle and injuring others. Marie Myslakowski, who was in-

jured, and Tina Marie Kelley [*sic*], who died following the accident, were passengers in the Pace vehicle which was being driven by 17-year-old Renee Pace. Robert Pace, Renee's father, purchased the vehicle in August of 1979 from Peter Plummer. Plummer acquired it from John Greenway, who originally purchased it from the Postal Service in 1975.

Plaintiffs claimed that the government was negligent in (1) selling the vehicle in question to the public, (2) failing to affix proper warnings on the vehicle, and (3) designing the vehicle with dangerously low rollover resistance. The district court dismissed the design claim after concluding that the plaintiffs failed to prove that the government was responsible for the design of the jeep. In opposition to the remaining claims, the government asserted that it is immune from liability because its acts involved the exercise of a discretionary function. Rejecting this contention, the district court found the government negligent in failing to warn the jeep's users of its high propensity to roll over, when used as a passenger vehicle. 608 F.Supp. 360 (E.D. Mich. 1985).

There was evidence before the district court that the government was aware of the so-called Cornell Report[1] which is an extensive study of the rollover propensity of vehicles of the same type involved in this case. The report contained test results from which it was specifically concluded that the vehicles tended to roll over more often and more easily than ordinary passenger automobiles.

In this appeal, the government contends that it is immune from liability for any negligence associated with the sale of the jeep; that even if it were not immune

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[1] Cornell Aeronautical Laboratory, Inc., *Test and Evaluation of a ¼ Ton Light Delivery Vehicle*, July 1971.

from liability, its failure to give a written warning against use of the jeep as a passenger vehicle was not negligence; and that even if its failure to issue such written warning was negligence, such negligence was not a proximate cause of the injuries and death that occurred in the accident.

We have no occasion to address the latter two contentions because we conclude that under 28 U.S.C. § 2680(a), the government is immune from liability for the acts and omissions complained of, and that the district court's contrary conclusion is error requiring reversal.

II.

At common law, the United States, its agencies and employees, were exempt from suits brought by its citizens. *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 411-12, 5 L.Ed. 257 (1821). In § 1346(b) of Title 28 of the *United States Code*, however, the government partially waived its sovereign immunity from tort liability. That section provides:

> "Subject to the provisions of chapter 171 of this title, the district court . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

[1] But an exception to this waiver is found in § 2680 of chapter 171 of Title 28 which provides:

"The provisions of this chapter and section 1346(b) of this title shall not apply to —

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

Thus, the government's waiver of sovereign immunity in § 1346(b) does not apply when the challenged act or omission involves a discretionary function or duty. Indeed, "[i]f a case falls within the statutory exceptions of 28 U.S.C. § 2680, the court lacks subject matter jurisdiction." *Feyers* v. *United States*, 749 F.2d 1222, 1225 (6th Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 2655, 86 L.Ed.2d 272 (1985).

The vehicle involved in the accident in this case was a Jeep Dispatcher 100 Model DJ-5A designed at the order of the Postal Service and used for mail delivery purposes. In its original condition, it was a right-hand drive vehicle with a letter tray positioned to the left of the driver, and storage space behind the driver and letter tray. The front right and left side doors slid open horizontally, and access to the rear of the vehicle was through two outward opening doors. A cab enclosed the entire vehicle.

Before Mr. Pace bought the jeep, it had been modified by removal of the letter tray and installation of a seat to the left of the driver. In addition, the entire interior of

the vehicle had been covered with carpeting, including all of the dashboard except for the instruments.

The Postal Service sold the jeep to the original purchaser, Mr. Greenway, as part of a program to dispose of its surplus property. The authority for the sale is found in 39 U.S.C. § 401(5), enacted in 1970, which provides:

> "The Postal Service shall have the following general powers:
>
> * * *
>
> "(5) to acquire, in any lawful manner, such personal or real property, or any interest therein, as it deems necessary or convenient in the transaction of its business; to hold, maintain, sell, lease or otherwise dispose of such property or any interest therein and to provide services in connection therewith and charges therefor . . . ."

Following the Post Office Department's decision to sell thousands of surplus jeeps, the department adopted and promulgated a Central Regional Instruction regarding sale of vehicles and a Central Regional Memorandum instructing postal district managers on the methods of sale (auction, spot sale, or sealed bid), and containing the following note:

> "All vehicles are to be advertised for sale *as-is-where-is* with customers given an opportunity to inspect the vehicles before bidding. Vehicles may be started but *not driven* by prospective buyers. Vehicle Maintenance history record (form 4620) may be shown to prospective buyers and given to the individual making the actual purchase. Limit number of vehicles offered for sale to fifteen for best results." (Emphasis added.)

The district court found that the departmental decision to dispose of the jeep was a "policy-based discretionary" decision:

> "[T]he Government's decision to sell the jeeps to the public was clearly a policy based discretionary function which is specifically within the purview of the execution of a statute and regulation (39 U.S.C. § 401(5) and 39 C.F.R. § 211.-2) . . . . The evidence before this Court indicates that, in making that decision, the Government considered the economic need to operate efficiently by recouping some of its expenditures through the sale of surplus goods . . . . If the threat of tort liability hung over the Government for the mere decision to sell such surplus goods, it would improperly impede a Government function and, thus, put the Courts in the position of interfering with policy decisions which have been properly reserved to another branch."

608 F.Supp. at 371.

The court then distinguished between the "decision to sell the jeep" and "the decision as to the manner of the sale of [the] jeep," declaring that the latter was a "separate matter." 608 F.Supp. at 371. The district court determined that "the decision not to warn subsequent passengers that the jeep, if used as a passenger vehicle, had a dangerous risk of rollover was not the exercise of a discretionary function," and that no immunity attached for the failure to give that warning. 608 F.Supp. at 372.

The distinction, according to the district court, is that the government made no executive level discretionary decision — no policy-based choice — "not to warn subsequent purchasers of the dangers of use of the jeep as a passenger vehicle." According to the court, the failure of

the Postal authorities to require that warnings be given was not a deliberate decision at all, but a mere omission, an act of default, attributable to department shortsightedness. Since no discretionary decision was taken — no "political, economic or social policy" choices made — concerning warnings, the statutory exception for such decisionmaking is inapplicable. The "decision" to give no warnings, the court held, "occurred in the course of the operational task of detailing the logistics of the sale and thus, was the mere omission of an operational task."

Having thus bifurcated what it found to be the Postal Service's discretionary decision, to dispose of the jeeps at public sale as part of its program to sell surplus property, from what it characterized as the non-discretionary "operational task of detailing the logistics of the sale" on the street, the court determined that, under Michigan law, the government breached its common law duty to warn against the use of the jeep as a passenger vehicle.

We think the learned district court erred in concluding that the government is not immune from liability under the discretionary function exception to the waiver of liability for tortious acts.

III.

The critical error in the trial court's analysis is in its conclusion that because the evidence does not show that the departmental policymakers evaluated the pros and cons of requiring that a warning be given concerning the rollover propensity of the jeep and then made a discretionary decision not to give such warnings, it therefore follows that no discretionary decision, of the kind contemplated by § 2680(a), was made concerning the terms, conditions, and "manner" of sale of the jeep. Thus, the statutory exception to the waiver of immunity

for such decisions is inapplicable. We respectfully disagree.

The fact that, in making the discretionary policy judgment to sell the jeeps "as-is-where-is," the government officials may not have evaluated some or all of the dangers associated with the use of jeeps as passenger vehicles and may have given no thought to the need for warnings even in view of the Cornell Report, is not to say that the considerations unaddressed are therefore outside the ambit of the discretionary judgment exception to the statute and a basis for establishing tort liability.

[2] Stated otherwise, even the negligent failure of a discretionary government policymaker to consider all relevant aspects of a subject matter under consideration does not vitiate the discretionary character of the decision that is made.

Indeed, it is, in part, to provide immunity against liability for the consequences of negligent failure to consider the relevant, even critical, matters in discretionary decisionmaking that the statutory exception exists. If it were otherwise, a judgment-based policy determination made at the highest levels, to which all would concede that the statutory exception applies (the decision to sell surplus jeeps), would result in no immunity if the decision could be shown to have been made without consideration of important, relevant factors, or was a decision negligently reached. If that reasoning were sound, the discretionary function exception would be inapplicable in every case in which a negligent "failure to consider" a relevant risk could be proved.

[3] Here, the decision to sell the vehicles included consideration and adoption of certain limiting conditions: the sale was to be "as-is-where-is." That included,

inferentially, no test driving, no mechanical inspection, no refurbishing or reconditioning, no express warranties, and certainly no warnings.

By determining that the lower level postal employee who actually carried out the mechanics of the sale accepted the purchase money, and handed over the keys to the vehicle, committed an actionable tort by not going beyond the "as-is-where-is" policy decision of his superiors, the district court effectively nullified the immunity with which Congress insulated the policy decision of the postal department officials who neither permitted nor authorized such warnings. Arguably, it was negligent for the Postal Department policymakers to have failed to require warnings, but it is for just such negligent decisionmaking that Congress has determined the government is to be immune from tort liability.

As the Court put it in *U.S.* v. *S.A. Empressa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 820, 104 S.Ct. 2755, 2768, 81 L.Ed.2d 660 (1984): "Judicial intervention in such decisionmaking through tort suits would require the courts to 'second guess' the political, social, and economic judgments of an agency exercising its regulatory function. It was precisely this sort of judicial intervention in policymaking that the discretionary function exception was designed to prevent."

Of the cases cited to us by the appellee in support of the trial court's conclusion, three were particularly relied upon by the district court and warrant our attention.

In *Reminga* v. *United States*, 631 F.2d 449 (6th Cir. 1980), a panel of this court held the government responsible in damages when a small aircraft struck a guy wire that stabilized a 1720-foot tower. It was shown that, following a discretionary decision by the Federal Aviation Administration to issue aeronautical navigation charts

pursuant to its authority to "order the use of the navigable air space," the agency negligently failed to accurately locate the tower on a chart it issued.

The import of our holding in *Reminga* is that once having exercised the discretion to issue navigational charts, the government is accountable for its negligence in failing to locate hazards accurately on the charts it publishes. Erroneously locating navigational hazards on its charts, like running a red light with a motor vehicle and causing an accident, involves no discretionary function or duty. Having undertaken, in its discretion, to issue charts locating navigational hazards at all, the FAA was liable for doing so carelessly.

That is not the case before us, however. Here, the Post Office Department discretionary policy decision to sell the surplus jeep vehicles "as-is-where-is" included no requirement that warnings be given concerning the rollover propensity of the vehicle. Therefore, the failure, whether purposeful or negligent, to require that such warning be given was part of the discretionary decision itself.

Similarly, in *Somerset Seafood Co.* v. *United States*, 193 F.2d 631 (4th Cir. 1951), the government was held liable for damages incurred when an oyster boat became stranded on the submerged hull of an old battleship that had been sunk by the United States in the Chesapeake Bay in 1911.

The Fourth Circuit held that the plaintiff had stated a claim under the Federal Tort Claims Act. *Id.* at 633. Responding to the government's contention that it was not liable for the breach of a discretionary duty to mark the wreck, the court stated that the government's duty under the Wreck Acts, 33 U.S.C. §§ 409, 736, 14 U.S.C. § 86, to either remove or mark the wreck was *mandatory*

and therefore not within the discretionary function exception. The court also stated:

> "In addition to this, we think that even if the decision to mark or remove the wreck be regarded as discretionary, there is liability for negligence in marking after the discretion has been exercised and the decision to mark has been made. There is certainly no discretion to mark a wreck in such a way as to constitute a trap for the ignorant or unwary rather than a warning of danger."

Somerset Seafood, 193 F.2d at 635.

In *Indian Towing Co.* v. *United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), the government was charged with negligence in permitting a lighthouse light to become extinguished and in failing to warn the tug "Navajo" that the light was not functioning. The government *conceded*, however, that the case did not involve the discretionary function exception of 28 U.S.C. § 2680, and the Court discussed 28 U.S.C. § 2674, a different statutory provision altogether. *Indian Towing*, 350 U.S. at 64, 76 S.Ct. at 124. In passing, the Supreme Court noted that once the Coast Guard "exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by that light, it was obligated to use due care to make certain that the light was kept in good working order . . . ." *Id.* at 69, 76 S.Ct. at 126.

In each of these cases, the government exercised its discretion: It decided to issue an aeronautical chart in *Reminga*, to mark instead of remove an old wreck in *Somerset Seafood*, and to operate a lighthouse on Chandeleur Island in *Indian Towing*. These decisions, the first two of which were entirely discretionary and the third

mandated by statute, once having been made, required the government to act with due care in carrying them out. In the case before us, had the postal authorities decided, in their discretion, to require that the public be warned of the danger of using the postal jeeps as passenger vehicles, they undoubtedly would have been obligated to use due care to warn of the rollover propensity of the vehicles. However, omitting to require that any warnings be given concerning the performance of jeep vehicles, whether purposeful or negligent, was an inherent part of the discretionary decision to sell the vehicles "as-is-where-is." It gives rise to no liability.

Finally, we observe that three other courts have considered the very question we address today in connection with accidents involving the same type of jeep vehicles, and each has reached the conclusion we have reached. See *Ford* v. *American Motors Corp.*, 770 F.2d 465 (5th Cir.), *reh'g denied*, 776 F.2d 1048 (1985); *Shirey* v. *United States*, 582 F.Supp. 1251 (D.S.C. 1984); *Louviere* v. *AM General Corp.*, 620 F.Supp. 6 (W.D. La. 1985). In all of these cases, the courts determined that the failure to warn subsequent purchasers of the jeeps' rollover propensities was an omission within the purview of the discretionary decisionmaking authority of the government for which Congress has provided immunity against liability under 28 U.S.C. § 2680(a). Although not bound by these decisions, we cite them as cases consistent with our reasoning today.

The decision of the district court is reversed.

APPENDIX B

MEMORANDUM OPINION
Reported at 608 F.Supp. 360 (D.C. Mich. 1985)

(United States District Court —
Eastern District of Michigan — Southern Division)

(Dated April 29, 1985)

(Betty GALANOS, as Personal Representative of the Estate of Tina Marie Kelly, Deceased and Matt Myslakowski, individually and as Next Friend of Marie Myslakowski, a minor, Plaintiffs, v. UNITED STATES of America, Defendant — Civ. A. Nos. 81-74236, 81-74235)

Negligence action was brought against the United States to recover damages for death of one passenger and for injuries sustained by another passenger in accident in vehicle sold by the Government. The District Court, Julian Abele Cook, Jr., J., held that: (1) there was no evidence to establish that driver of the vehicle was so affected by alcohol that her condition, if altered, was the cause, or was contributing factor to, the accident; (2) there was no evidence that driver's operation of the vehicle was so negligent as to be sole cause of the accident; (3) Government was not guilty of negligent design of the vehicle in question; (4) Government's decision to sell the vehicle was within discretionary function exception to Government liability under Federal Tort Claims Act; (5) Government had duty to give written warning to foreseeable users of the vehicle of rollover propensity of the vehicle; and (6) Government's breach of duty to warn foreseeable users of the vehicle of its rollover propensity was proximate cause of the accident.

Judgment for plaintiffs.

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1. Automobiles ☞244(36)

In negligence action against United States to recover damages for death of one passenger and for injuries sustained by another passenger

in vehicle sold by the Government, evidence, including failure of several witnesses and police investigators to corroborate two witnesses' claim that they saw people throwing beer cans from the vehicle after the accident in question, and absence of evidence that beer had been consumed by the vehicle's driver in close proximity to the accident, supported finding that there was no evidence which established that driver was so affected by alcohol that her condition, if altered, was the cause, or was contributing factor to, the accident. 28 U.S.C.A. §§ 1331, 1346 et seq.

2. Automobiles ☞244(36)

In negligence action against United States to recover damages for death of one passenger and for injuries sustained by another passenger in accident in vehicle sold by Government, there was no evidence that driver's operation of vehicle was so negligent as to be sole cause of the accident. 28 U.S.C.A. §§ 1331, 1346 et seq.

3. Products Liability ☞36

United States was not guilty of negligent design of vehicle, in which one passenger was killed and another injured in accident, in view of evidence that Government was responsible only for certain procurement type specifications and performance specifications but not design specifications to any significant degree, and that only relevant design type role that Government had, location of sorting tray which would affect center of gravity, could not have been factor in causing the accident since the tray had been removed. 28 U.S.C.A. §§ 1331, 1346 et seq.

4. United States ☞125(8)

Generally, United States and any of its agencies are exempt from suit by its citizens; it can, however, waive its sovereign immunity, with liability being limited to express extent of the waiver. 28 U.S.C.A. § 1346.

5. United States ☞78(9)

Claim of strict liability of United States would be outside parameters of Federal Tort Claims act. 28 U.S.C.A. § 1346.

6. United States ☞78(12)

Government's decision to sell Postal Service vehicles as surplus to public was policy-based discretionary function specifically within purview of execution of statute and regulation and was within "discretionary function" exception to Government liability under Federal

Tort Claims Act. 28 U.S.C.A. §§ 1346, 1346(b), 2680, 2680(a); 39 U.S.C.A. § 401(5).

See publication Words and Phrases for other judicial constructions and definitions.

7. United States ☞78(12)

Government's decision not to warn subsequent purchasers of surplus Postal Service vehicle that the vehicle, if used as passenger vehicle, had dangerous risk of rollover was not exercise of "discretionary function" within exception to Government liability under Federal Tort Claims Act, since Government made no policy-type decision not to give such warning and there was readily ascertainable data to indicate that such danger existed. 28 U.S.C.A. §§ 1346, 1346(b), 2680, 2680(a).

8. Products Liability ☞14

Under Michigan law, duty of seller of used goods to relate information as to character of the chattel which seller should recognize as necessary to enable prospective user to realize danger of using it applies to dealers and used goods as well as to one-time sellers of used products.

9. Products Liability ☞26

Under Michigan law, designation of sale as being on "as is" basis does not relieve seller of his duty of care, under theory of negligence.

10. Products Liability ☞37

Under Michigan law, United States had duty to give written warning, to foreseeable users of surplus Postal Service vehicles which it sold to public, not to use the vehicles as passenger vehicles, in view of Postal Service's knowledge of danger of rollover of the particular type of vehicle involved and reasonable foreseeability of use of the vehicle as passenger vehicle, and in view of evidence that the danger was latent.

11. Products Liability ☞83.5

Government's breach of duty to warn foreseeable users of surplus Postal Service vehicles which it sold to public of rollover propensity of the type of vehicle in question was established as proximate cause of accident which resulted in death of one passenger and injuries to another passenger in one of such vehicles. 28 U.S.C.A. § 1346.

12. Death ☞95(1)

Representative of estate of passenger killed in automobile accident was awarded $550,000, exclusive of costs, interest and attorney fees, for pain and suffering which the passenger experienced from time of the accident until time of her death shortly thereafter, grief to her family, and resultant burdens.

13. Damages ☞132(3)

Automobile passenger who continued to suffer from brain damage known as closedhead injury, along with several physical injuries which she incurred in automobile accident, and who was hospitalized for approximately two and one-half months, undertook extensive therapy to help her memory and walking, and who, despite significant improvement, continued to suffer from memory deficit, was awarded $350,000 damages exclusive of costs, interest and attorney fees.

Gary C. Berger, Allen Miller, Detroit, Mich., for plaintiffs; Ellen Ritteman, Gary Maveal, Asst. U.S. Attys., Detroit, Mich., for defendant.

JULIAN ABELE COOK, Jr., District Judge.

I.

On November 16, 1981, Plaintiff, Matt Myslakowski [Myslakowski], filed a Complaint, in his individual capacity and as a next friend of Marie Myslakowski, against the Defendant, the United States of America [Government]. (That case was assigned to this Court). On the same day, Plaintiff, Betty Galanos [Galanos], filed a Complaint against the Government as personal representative of the Estate of Tina Marie Kelly. While the latter case was initially assigned to another judge, it was subsequently reassigned to this Court and consolidated with the former case because of the common issues of law and fact that were presented in the two causes of action. A trial on the merits was held, without a jury, from February 1, 1985 to February 11, 1985.

At the close of evidence, the Court took the matter under advisement.

II.

These actions are brought under the Federal Tort Claims Act [FTCA], 28 U.S.C. § 1346 *et seq.* While there is a question raised by the Government as to the applicability of this Act to the instant cause, should Plaintiffs' claim that the Government has waived its immunity as to this action prove to be correct, jurisdiction would be conferred upon this Court by 28 U.S.C. § 1331. This section grants district courts original jurisdiction over all civil actions arising, *inter alia*, under the laws of the United States.

III.

This cause of action arose out of a motor vehicle accident which occurred on October 13, 1979. As a result of that accident, Tina Marie Kelly, died. Marie Myslakowski, who was also in the accident, suffered critical injuries. Plaintiffs seek damages from the Government for the losses which they have suffered by reason of the death of Tina Marie Kelly and for the injuries that were sustained by Marie Myslakowski. Plaintiffs assert that the Government, through the United States Postal Service [Postal Service], was negligent in its sale of the vehicle in which Tina Marie Kelly and Marie Myslakowski were passengers. Specifically, Plaintiffs claim that the Government was negligent in (1) selling the vehicle in question to the public, (2) failing to convey proper warnings and/or instructions to subsequent purchasers of the vehicle, and (3) designing the vehicle with a low rollover resistance. The Government argues, in opposition, that it is immune from suits of this nature which purportedly involve a "discretionary function." Furthermore, the Gov-

ernment urges that Plaintiffs' claim of negligent design is without merit because the Government did not design the vehicle. The Government asserts that, if this Court finds the discretionary function exception to be inapplicable, (1) it breached no duty to Plaintiffs, and (2) its negligence, if any, was not the proximate cause of the claimed injuries.

IV.

On the evening of October 13, 1979, four young women were driving south on Ryan Road near the intersection of Hamlin Road in Shelby Township, Michigan. The driver, Renee Pace [Pace], had the permission of her father, the owner, to use the DJ-5A "Jeep" vehicle in which the four rode that evening. The two passengers, who are the subject of this case, were seated in the back of the vehicle that night. The evidence shows that the girls were coming from a nearby Yates Cider Mill where they had been for approximately three hours. Over the course of this time, Pace consumed two beers. There is no evidence, however, to support a conclusion that she was intoxicated to the point where it could be said that her state was the proximate cause of the accident.

The evidence further shows that the Pace vehicle was going between thirty-five and forty-five miles per hour in the southbound lane of Ryan Road, and that it was moving generally at the same speed as the other traffic in that area. Shortly before the accident, however, the Pace vehicle traversed slightly to the right onto the shoulder of the road. No evidence tends to explain the vehicle's diversion except that Pace testified that she lost control of the jeep and did not know why. In an attempt to get the vehicle back on the road, Pace turned the steering wheel left, and, thereby, caused the vehicle to enter the northbound lane of Ryan Road. She attempted

to reverse the direction of the vehicle in an effort to get it out of the lane of the oncoming northbound traffic. However, before this manuever had been completed, and while the jeep was still partially in the northbound lane, it impacted with a vehicle which was being driven by William Bell [Bell] in a northerly direction on Ryan Road. After the impact, the jeep spun into the air over the Bell car and, after apparently several rotations, landed on its top in the southbound lane of Ryan Road, south of the point of impact.

Three of the girls, including Tina Marie Kelly and Marie Myslakowski, were thrown onto the ground as a result of the impact. Tina Marie Kelly and Marie Myslakowski were farthest from the point of impact, laying on the western shoulder of the road. Pace, originally pinned in the vehicle, was helped out soon after the accident.

[1, 2] There was some evidence by two of the witnesses to the accident, George Steadman [Steadman] and Joseph Rentz, both of whom were in the Bell car, that they saw people throwing beer cans from the jeep after the accident. However, this Court attaches no significance to this testimony for two reasons. First, despite the fact that several other witnesses and police investigators testified as to the post-accident occurrences, none of them corroborated this story. Secondly, even if beer cans had been thrown from the car, there is absolutely no evidence that the contents of these cans had been consumed by Pace in close proximity to the accident. In fact, Steadman denied having smelled beer on the breath of any of the girls, even though he came in close contact with them immediately after the accident in the process of giving aid and comfort to them. Thus, this Court confirms its earlier stated finding that there is no evidence which establishes that Pace was so affected

by alcohol that her condition, if altered, was the cause, or a contributing factor to, the accident. Similarly, there is no evidence that Pace's operationa of the jeep was so negligent as to be the sole cause of the accident.

Marie Myslakowski was hospitalized shortly after the accident and remained in hospitals for the next two and one half months. Tina Marie Kelly was pronounced dead at 10:00 p.m. on the night of the accident within an hour of its occurrence. However, it appears that death was not simultaneous with the accident as several witnesses attested to her being alive immediately after the collision.

V.

The vehicle in which the girls were riding on the night of the tragic accident was a Jeep Dispatcher 100, Model DJ-5A. It was manufactured for the Postal Service by Kaiser Jeep Corporation and delivered to the Postal Service in 1969. The Postal Service used the jeep for mail delivery from this time until the vehicle was designated as surplus and, then, sold in 1975.

The vehicle involved in the case at bar was sold as a part of the Postal Service's general scheme of selling surplus items in order to promote efficiency and recoup some of its investment in these vehicles that had been replaced by newer models. The vehicles were sold to the general public on an "as is, where is" basis. However, the buyers were given the maintenance records on the vehicles. Also, Dennis Tepner [Tepner], the Postal Service employee who sold the jeep involved in the case at bar, warned potential purchasers to check the vehicle before buying it for bad tires, leaks, etc. Moreover, there was a decal on the dashboard of the jeeps which warned drivers to look before backing up. Finally, Tepner testified that he further warned buyers to drop back more

when passing to assure visibility of oncoming traffic since the driver's seat was on the right of the vehicle. However, he gave no other warnings regarding the vehicle. In fact, he was not required to do so by the Postal Service.

The jeep was sold with only one seat (to wit, the driver's right hand seat). There was a metal tray on the left hand side of the vehicle which was used by the letter carriers to sort their mail for delivery. The front side doors slid open, and the only direct entrance to the back was through the two outward opening doors on the rear of the vehicle. The entire front and back of the vehicle were enclosed under the cab of the jeep.

Tepner promoted the sale of the jeeps through advertisements in newspapers, announcements sent to interested persons who were on the Postal Service mailing list, and by putting a "for sale" sign on a jeep stationed in front of the place where they were sold. The purchaser of the jeep involved in the present case from the Postal Service was John Greenway [Greenway] who bought it from the Postal Service in Flint, Michigan. Tepner does not recall if he gave Greenway an operator's manual or if there was one in the jeep when it was sold, although he stated that, generally, purchasers were given one. There was no testimony as to the purpose for which Greenway bought the jeep.

Greenway subsequently sold the jeep to Peter Plummer [Plummer], who primarily used the jeep for hunting. Plummer, in turn, sold the jeep to Robert Pace, father of Renee Pace, in August of 1979, just two months before the accident involving the Plaintiffs. Robert Pace used the jeep for many purposes, including his use of the vehicle as a general passenger car for family errands. Between the time that the jeep left the Postal Service and the time of the accident, the mail

sorting tray had been removed from the front left of the jeep and a seat had been installed on the left front side. Also, much of the floor of the jeep and the dashboard had been carpeted. No seats were in the back, although two tire humps accommodated the two girls in the rear on the night of the fatal crash.

VI.

[3] The record allows the Court to readily reject the Plaintiffs' claims of negligent design. There was a failure by Plaintiffs to demonstrate, by a preponderance of the evidence, that the Government was responsible for the design of the jeep. While Plaintiffs' expert witness, John Noettle, testified that the Postal Service controlled the position of the workshelf and the height of the door, this Court cannot conclude that control of these facts gave the Postal Service a significantly relevant design role in the design of the jeep.

Rather, the weight of the evidence tends to show that the Postal Service was responsible only for certain procurement type specifications and performance specifications but not design specifications to any significant degree. Procurement specifications were described as a "sort of wish list" of characteristics which were not necessarily related to the resulting products. The range of specifications, which have been listed as procurement "specs," were intentionally broad so as to encourage competition among manufacturers who bid for the production contract. Next, performance specifications were issued which state what the Postal Service would like the jeep to be able to do, with no control reserved to the Postal Service as to *how* the desired performance characteristics were to be achieved. In contrast, design specifications state exactly how an object or part is to be made, in such detail that if given to any two manufacturers

each would produce the identical part. The only design type specifications that the Postal Service issued to the Kaiser Jeep Corporation were for the location of the slot for a Postal Service poster to be placed on the side of the jeep, the location of the two sorting shelves and the placement of a special mirror.

From only one of these factors (to wit, the weight and location of the work shelf) was there any indication that it had any effect on the characteristic of the jeep of which Plaintiffs complain, i.e., rollover propensity. The Plaintiffs' and the Government's experts testified that the rollover propensity of the jeep was primarily affected by the wheel base, the track width and the height of the center of gravity. While any change in weight, such as the addition of a tray in the jeep, would affect the center of gravity, the sorting tray had been removed from the vehicle at the time of the accident from which this case arose. Thus, the only relevant design type role that the Postal Service had with respect to this vehicle could not have been a factor in causing the accident.

VII.

Plaintiffs' two remaining claims (i.e., negligence in selling the jeep and in failing to warn of its rollover propensity) require this Court to undertake a more extensive analysis of the applicable law. First, the Court must determine if the Government's sovereign immunity bars this suit because, if it does, this Court is without subject matter jurisdiction to hear these claims, see *Carlyle* v. *U.S. Dept. of Army*, 674 F.2d 554 (6th Cir. 1982).

[4] Generally, the United States and any of its agencies are exempt from suit by its citizens. It can, however, waive its sovereign immunity, with liability being limited to the express extent of the waiver, see *U.S.* v.

Orleans, 425 U.S. 807, 96 S.Ct. 1971, 48 L.Ed.2d 390 (1976). Through the FTCA, 28 U.S.C. § 1346, the Federal Government did waive its sovereign immunity as to damages for those injuries which result from certain torts that are attributable to, and committed by, a government employee, while acting within the scope of his/her authority. The FTCA, 28 U.S.C. § 1346(b), authorizes suits against the United States or its agencies:

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2680 of this Act sets forth the exceptions to this waiver of immunity. The Government contends that the following exception, which is found in this paragraph, is applicable:

> (a) any claim based upon an act or omission of an employee of the government, exercising due care in the execution of a statute or regulation, whether or not such statute or regulation be valid or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Much has been written as to what constitutes a discretionary function, as opposed to its antithesis of an operational function. However, the nature of "discretion" is such that it precludes a precise definition that

would give meaningful guidance in each and every case. As noted in *U.S. v. S.A. Empressa De Viacao Aerea Rio Grandense (Varig Airlines) et al*, __ U.S. __, at __, 104 S.Ct. 2755 at 2765, 81 L.Ed.2d 660 (1984) ". . . it is unnecessary — and indeed impossible — to define with precision every contour of the discretionary function exception." Nonetheless, a purview of some characteristic cases provide general guideposts as to the nature of the term.

The starting point of such an overview must necessarily be *Dalehite* v. *U.S.*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953). This landmark case was the Supreme Court's first opportunity to interpret the FTCA. *Dalehite* involved a claim of negligence "on the part of the entire body of federal officials and employees involved in a production of the material — Fertilizer Grade Ammonium Nitrate [FGAN] — in which the original fire occurred and which exploded." This fertilizer was shipped by the United States Government overseas to help feed occupants of Germany, Japan and Korea who had been left with inadequate food sources due to the post-World War II hostilities. The fertilizer was provided, in part, in order to mitigate the danger of internal unrest overseas. Following a cabinet level decision to manufacture and export the FGAN to various Asian and European countries, a program was set in place by the United States Government officials whereby private companies, who operated the plants where FGAN was produced, were subject to the general supervision of one or more Government personnel.

The particular FGAN in question had been stored in warehouses at Texas City, Texas for a period of three weeks. Then, on April 15, 1947, the FGAN was loaded onto two ships for export, one of which also contained a substantial cargo of explosives. Unfortunately, the FGAN

contained nitrate — long used as a component in explosives which ignited on contact with the explosive cargo. By the time that smoke was noticed on the ship, all efforts to stop the fire were unavailing. Both of the ships with the FGAN on them exploded, much of Texas City was leveled, and numerous deaths ensued. Victims and their families sued the Government on the basis of its participation in the program to manufacture and export the FGAN.

In *Dalehite*, as in the instant case, the Government asserted that its role in the FGAN program, for which Plaintiff sought to hold it liable, came within the scope of a "discretionary function." In deciding this issue, the Supreme Court reviewed the legislative history of the FTCA. This history reveals that the discretionary function exception was intended to ensure that the constitutionality of legislation, the legality of regulations and the propriety of a discretionary administrative act would not be tested through tort suits. The Supreme Court noted that ". . . Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions," *Dalehite* at 32, 73 S.Ct. at 966.

The *Dalehite* Court, while finding that discretionary functions include determinations regarding the initiation of programs, as well as decisions that establish plans and specifications of operations for this program, found that for these determinations to be considered discretionary, they must involve policy judgments, *id.* at 35-36, 73 S.Ct. at 967-968. Thus, on the basis of their review of the intent of the drafters of the FTCA, the Supreme Court determined that the decision to institute the FGAN program, as well as the decision regarding precautions to be taken in the course of manufacturing and exporting it, were discretionary functions.

In general, the Court found that "the decisions held culpable were all responsibly made at a planning rather than operational level and involved decisions more or less important to the practicability of the Government's fertilizer program," *id.* at 42, 73 S.Ct. at 971.

Similar to the failure to warn claim of Plaintiffs in the case at bar, there was an argument by Plaintiffs in *Dalehite* that the label on the bags of FGAN gave insufficient notice to the ship's personnel of the contents of the fertilizer. However, the Court rejected this argument, finding that the act of labeling the bags of FGAN was also discretionary. Yet, this finding is not dispositive of the issue of the failure to warn which has been presented in the instant case because the labeling involved in the FGAN program was specifically dictated by Interstate Commerce Commission regulation, *id.* at 42, 73 S.Ct. at 971. These regulations gave details on how the FGAN was to be labeled and no further information was required to be on the label. Indeed, the Court found that any variance on the label "was probably forbidden," *id.* Thus, the Court noted that this regulated act was exempt from the waiver of sovereign immunity because of the portion of 28 U.S.C. § 2680(a) which excepts "an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation . . ." from liability under the Act.

[5] Finally, it is relevant to note that the *Dalehite* Court rejected any notion of the Act extending to absolute or strict liability. The FTCA, the Court noted, "is to be invoked only on a negligent or wrongful act or omission of an employee," *id.* at 44, 73 S.Ct. at 972. This may be relevant to the instant case since one possible reading of Plaintiffs' claims is that the Government's role in the design and sale of the jeep subjects it to strict liability for any injuries caused by the jeep. Such a claim by the

Plaintiffs in the instant case must be rejected, as were similar claims by the Plaintiffs in *Dalehite*, for being outside the parameters of the FTCA.

Like *Dalehite*, the Sixth Circuit case of *Downs* v. *U.S.*, 522 F.2d 990 (6th Cir. 1975), presents a broad overview of the discretionary function exception and its applicability to certain governmental acts. In *Downs*, the Court found the Government to be liable for the acts of the Federal Bureau of Investigation [FBI] agents which resulted in the death of victims of a hijacking. A hijacker, seeking to fly to the Bahamas from Tennessee, landed the hijacked plane for a refueling stop in Jacksonville, Florida. There, despite warnings from the pilot that any Government intervention would likely precipitate hostility on the part of the armed hijacker, the FBI attempted to use rifles to secure the plane. As a result, the hijacker was provoked to kill himself, his wife and the pilot.

Referring to the discretionary function exception, the *Downs* Court noted that while the FBI agents, who were involved in that case were called upon to exercise judgment

> . . . Judgment is exercised in almost every human endeavor. It is not the mere exercise of judgment, however, which immunizes the United States from liability for the torts of its employees . . . . Driving an automobile involves judgment . . . . Yet the automobile accident caused by a federal employee while on the job is the archetypal claim which Congress sought to place in the Courts. If exercise of judgment were the standard for applying the discretionary function exception, a host of cases would have been wrongly decided. *Id.* at 995.

Rather, the Court went on to state that the "discretionary function exception immunizes the Government employees while they are formulating policy," *id.* at 996, and noted that the legislative history of the Act, as well as *Dalehite, supra,* supported such a finding. Moreover, *Downs* found that cases, which seek to define the distinction between discretionary and operational functions by looking at the status of the official who makes the judgment, do not offer a sufficient test for determining whether the actions of a Government employee are outside the scope of the FTCA. The *Downs* Court chose to adopt a less superficial test, noting:

> We believe that the basic question concerning the exception is whether the judgments of a Government employee are of "the nature and quality" which Congress intended to put beyond judicial review . . . . Congress intended "discretionary functions" to encompass those activities which entail the formulation of governmental policy, whatever the rank of those so engaged. *Id.* at 997.

Applying these considerations to the facts before it, the Sixth Circuit concluded that the acts of the FBI in that particular hijacking situation were not the type which the legislature intended be included in the discretionary function exception. The Court found that no policy type decisions dictated the type of judgments which were involved in that case and that there was no evidence that the governmental function being performed would be unduly inhibited by the threat of tort liability if the immunity was not granted.

Similarly, this Circuit in *Reminga* v. *U.S.*, 631 F.2d 449 (6th Cir. 1980) confirmed that discretionary functions are defined by the nature of the decision involved. This opinion, which cited *Downs, supra,* with approval, involved a small aircraft which crashed after running

into a wire from a television tower that was not shown on a Federal Aviation Association [FAA] map and whose placement was approved by the FAA. The Court found that where the distinction between operational and discretionary functions is not clear, the distinction must turn on the extent to which policy is involved in the decisioning. *Reminga* quoted the following passage from *Griffin* v. *U.S.*, 500 F.2d 1059 (3rd Cir. 1978) where the Government was held liable for injuries which had been caused by a vaccine that its doctor had prescribed:

> The Court emphasized that the only thing challenged was the way in which a regulation was implemented. While implementation involved the exercise of judgment, it was the judgment of a professional measuring of particular medical offset of laboratory activities, "not that of a policymaker promulgating regulations by balancing competing policy considerations in determining the public interest."

While the *Reminga* Court held that the FAA's decision to authorize the placement of the tower was a discretionary function, this holding was based on the finding that the FAA had sufficiently demonstrated that it considered competing demands and made its decision on policy bases within the range of discretion which the applicable regulations had specifically granted to it.

See also *Miller* v. *U.S.*, 583 F.2d 857 (6th Cir. 1978) where the Court held that the discretionary function exception does not immunize the Government from liability for the manner in which its agents operated the flood gates at Sault Ste. Marie, although it did insulate the Government from tort liability for "*deliberate* official decisions and directives" regarding the levels at which the lake would be maintained, *id.* at 867 (emphasis added). As noted in the district court on remand, *Miller*

v. *U.S.*, 480 F.Supp. 612 (E.D. Mich. 1979), "the discretionary function exception to liability under the FTCA does not insulate the government from liability for all mistakes of judgment, but only for significant policy and political decisions . . . ."

The Government, in the instant case, seeks to inject an alternative standard by which to draw the distinction between discretionary and operational functions. In furtherance of this position, the Government cites *Barton* v. *U.S.*, 609 F.2d 977 (10th Cir. 1979) which states as follows:

> The rule is that if a government official in performing his statutory duties *must* act without reliance upon a fixed *or readily ascertainable standard*, the decision he makes is discretionary and within the exception of the Tort Claims Act. (emphasis added)

In that case, the Government was sued by ranchers who were adversely affected by the Bureau of Land Management's [BLM] decision to revoke their cattle grazing rights. The BLM decision was based on its belief that, due to drought, overgrazing would subject the land in question to permanent damage. However, the affected ranchers "disagreed with the decision, claiming that the feed on the allotment was adequate to support the designated number of livestock on the land without substantial injury," *id.* at 979. However, the Court gave no indication of any research or expert opinion that would indicate that the ranchers' opinion was based on any standard other than their own self interest. Moreover, the *Barton* opinion indicates that the Government's decision was based on a consideration of factors that would affect the Government's ability to preserve and protect the land for public grazing. After considering the factors which affect the policy in favor of such protec-

tion, the Court concluded that the Government had made a deliberate policy decision.

Here, the Government also seeks support for its position in two FTCA cases which involve Government decisions to limit its role in safety inspection by delegating that duty to private parties. In *U.S.* v. *S.A. Empressa De Viacao Aerea Rio Grandense (Varig Airlines) et al*, ___ U.S. ___, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984), one hundred twenty four passengers were killed when an airplane crashed after fire broke out in the cabin. The FAA had issued documents which certified that the plane conformed with minimum safety standards. Thus, the Plaintiffs alleged that the FAA had been negligent in its certification of the airplane since the fire would not have occurred but for the substandard conditions on it. However, the FAA responded that it had properly certified the airplane on the basis of the documentation which had been presented by the owner. Under the statutory and regulatory scheme, the FAA merely "spotchecked" the airplanes and left the inspection of details up to the owners to obtain.

While the Plaintiffs argued that the FAA should have fully inspected the airplanes, the FAA replied that such a detailed inspection by it would not be feasible due to the limitations of time and funding. The Court found that the FAA's decision to put the burden of compliance with FAA regulations up to the owners was discretionary because, in making this decision, it had considered the feasibility of the program and how to "best accommodate the good of air transportation safety and the reality of finite agency resources."

In reaching this conclusion, the Court specifically found that whether the discretionary function exception applies depends on "the nature of the conduct, rather

than the status of the actor," *id.* at __, 104 S.Ct. at 2765. Thus, the Supreme Court stated:

> . . . the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a government employee — whatever his or her rank — are of the nature and quality that Congress intended to shield from tort liability.

Moreover, the Court noted that the Congressional intent in enacting the discretionary function exception was "to prevent judicial second-guessing of legislative and administrative decisions grounded in *social, economic* and *political* policy through the medium of an action in tort." (emphasis added)

The Court found that the Congress specifically intended that the FAA share the safety inspection rule with the public. The Congress and the agency had considered that, with fewer than four hundred engineers, the FAA could not possibly complete an elaborate compliance review process alone. Thus, the FAA was authorized by 49 U.S.C. § 1355 to delegate certain inspection responsibilities to qualified private persons. Since the Government considered the competing economic and social needs, and acted with specific regulatory and statutory authority, the Court found that the FAA decision to delegate certain inspection tasks was discretionary.

Similarly, in *Feyers* v. *U.S.*, 749 F.2d 1222 (6th Cir., 1984), Plaintiff claimed negligent inspection and failure to provide safety training by the Government, in the railyard where he worked and was injured. Plaintiff was employed by Chrysler Corporation [Chrysler] who operated the Detroit Arsenal Tank Plant which was owned by the United States Government.

The Government had contracted with the private employer to have Chrysler bear the responsibility for maintaining a safety program at the plant, with the Government only to make periodic spot reviews. The Court found that the Government made this decision on the basis of (1) Chrysler's competency in management of safety programs, (2) the limited access to the plant by Governmental inspectors due to Chrysler's need for security, (3) the Government's inability or reluctance to intervene in Chrysler's standard safety practices, and (4) a study of safety statistics at the plant. Thus, the Court concluded that this decision, as the decision in *Varig*, entailed policy considerations, *id.* at p. 365. Consequently, it concluded that the decision to delegate the safety inspection duties to Chrysler was a discretionary function.

In addition to these cases (where the Government had deliberately, and with consideration of political, economic and/or social factors, decided not to bear certain responsibilities), there is another line of cases which hold that where the Government does bear the responsibility of a particular task, it is liable for the failure to perform that task free of negligence. In *Indian Towing Co.* v. *U.S.*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), the Supreme Court considered the liability of the United States Coast Guard [Coast Guard] for the grounding of a boat which was precipitated by a failure of the light at the Coast Guard operated lighthouse. The Court found the Government liable, pursuant to the FTCA holding, as the Government conceded, that the discretionary function exception did not apply. The Court held that ". . . it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good samaritan' task in a careful manner," *id.* at 64-65, 76 S.Ct. at 124. Moreover, the Court held, at 69, that:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order . . . .

A like holding was rendered by the Tenth Circuit in *Smith* v. *U.S.*, 546 F.2d 872 (10th Cir. 1976). There, a young boy was severely burned when he wandered into a super-heated thermal pool in Yellowstone Park. While the Government had put up warning signs in several areas of the park, the area where the Plaintiff was injured, although open to the public, was devoid of such signs. The Government argued that its decision not to place warning signs there was based on a "policy decision" to leave that area developed so as to conserve the scenery.

While the Court and the Plaintiff conceded that the decision to leave some areas of the park developed was a discretionary function, the Court concluded that the decision not to warn of the dangers of the thermal pools was a separate act, which was not within the ambit of a § 2680 exception. The Court reasoned:

> A policy decision to designate certain areas as "developed" ones may reasonably entail the omission of boardwalks, trails or footpaths and signs marking such ways. However, it does not follow that the Government, as a land owner, is absolved of all duty under state law to erect safety devices or signs cautioning about conditions which have been left undisturbed as a policy matter.

Several other Courts have held, in conformity with these above-cited cases, that while policy may determine the decision to carry out a discretionary function, decisions as to the *manner* in which that function is carried out, if not also dictated by policy, are not discretionary functions. See, e.g., *White* v. *U.S.*, 317 F.2d 13 (4th Cir. 1963) where the Court of Appeals for the Fourth Circuit rejected the Government's contention that the doctor's decision as to the degree of freedom allowed a particular mentally ill Veterans Administration [VA] Hospital patient, who died while out on privileged status, was discretionary. The Court found that ". . . while the policy embodied in the VA regulations that patients should be allowed the maximum freedom warranted by their condition is a discretionary decision, the application of that policy to the individual case is an administrative decision at the operational level which if done negligently will make the Government liable . . . ." See also *Hernandez* v. *U.S.*, 112 F.Supp. 369 (D. Hawaii 1953).

Similarly, in *Somerset Seafood Co.* v. *U.S.*, 193 F.2d 631 (4th Cir. 1951), the Court held that once a Government decision had been made to provide for boat traffic safety around a wrecked ship, that function must be carried out free of negligence. The Court stated that "there is certainly no discretion to mark a wreck in such a way as to constitute a trap for the ignorant or unwary rather than a warning of danger." See also *Reminga, supra,* 631 F.2d at 452 where the Court held that the decision of the FAA to designate the location of aerial towers on its maps, while not a required FAA function, once undertaken, must be carried out without negligence. Also supportive of this position is *Akra Shipping Co.* v. *U.S.*, 363 F.Supp. 1220 (D. S.C. 1973) "there are numerous cases which hold that, once the Government has exercised its discretion and has decided to proceed in a matter, the

Government is liable for negligent acts done in the course of such proceedings," at 1221.

The Government again seeks to assert a contrary rule of law by citing *Stewart* v. *U.S.*, 486 F.Supp. 178 (C.D. Ill. 1980). There, Plaintiff claimed that her diseased husband had been killed by asbestosis, a pulmonary lung disease which he contracted during his work with old asbestos that had been sold to his employer from the Government's national stockpiles of asbestos. Plaintiff claimed, *inter alia*, that the Government was negligent in selling the asbestos without proper warnings. While the Court held that the Government's actions with regard to this sale were discretionary functions, several aspects of this case deserve consideration. First, that case held, in conformity with above cited law, that the decision to sell, although discretionary, must be considered as separate from the decision not to warn. Also, the Court confirmed that only if the decision to sell the asbestos without warnings was "a decision necessitating the weighing of *policy* considerations," *id.* at 183, was the Government's decision protected from liability by § 2680(a) of the FTCA.

Finally, the Court decided that the no-warning decision was protected because it involved policy decisions. Specifically, the Court found that the Government had considered (1) the cost of its examination of the asbestos after the long storage period and determined that it was too great, and (2) the fact that the buyers were all knowledgeable members of the relevant industry that had the ability to determine the condition of the asbestos for themselves.

The last line of cases which this Court has reviewed in determining the applicability of discretionary function exception are the cases that specifically considered the issue of the Government's liability to persons who were

injured in an accident involving the alleged rollover of a used postal jeep. See *Ford* v. *U.S.*, No. 81-1922 (S.D. Tex., January 24, 1984); *Shirey* v. *U.S.*, 582 F.Supp. 1251 (D. S.C. 1984); and *Key* v. *U.S.*, No. 83-168 (E.D. Ark., April 30, 1984). All these cases — to the extent that they find the Postal Service's failure to warn to be a discretionary function — are distinguishable from the instant case. In none of these cases was there any indication that the jeep was being used as a passenger jeep, as in the instant case. Thus, there was no claim based on failure to warn *against the use of the jeep as a passenger vehicle*, which Plaintiffs, in the instant case, make.

[6] First, this Court concludes that these cases dictate a finding that the Government's decision to sell the jeeps to the public was clearly a policy based discretionary function which is specifically within the purview of the execution of a statute and regulation (39 U.S.C. § 401(5) and 39 C.F.R. § 211.2, along with, e.g., Government's exhibits H, I and L). The evidence before this Court indicates that, in making that decision, the Government considered the economic need to operate efficiently by recouping some of its expenditures through the sale of surplus goods (see, e.g., deposition of Donald C. Crane, then Director of Office of Fleet Management and the person who oversaw the Postal Service's sale of jeeps). If the threat of tort liability hung over the Government for the mere decision to sell such surplus goods, it would improperly impede a Government function and, thus, put the Courts in the position of interfering with policy decisions which have been properly reserved to another branch.

Further, to the extent that the Plaintiff claims the Government to be liable for the sale of the jeep under a theory of *strict liability*, this theory must be rejected as outside the purview of the FTCA. See *McKay* v. *U.S.*,

703 F.2d 464 (10th Cir. 1983). See also *Kueppers* v. *Chrysler Corp.*, 108 Mich.App. 192, 310 N.W.2d 327 (1981), stating the Michigan Rule that "reliance on an implied warranty theory of recovery was precluded where the goods were purchased 'as is,'" at 210, 310 N.W.2d 327.

[7] However, as the foregoing authorities indicate, the decision as to the *manner* of the sale of these jeeps is a separate matter. This Court must consider whether the Government, having properly exercised its discretion to put the jeeps up for sale, made decisions as to the manner of sale on the basis of policy type considerations. The evidence indicates that it did not. Specifically, this Court finds that the decision not to warn subsequent purchasers that the jeep, if used as a passenger vehicle, had a dangerous risk of rollover was not the exercise of a discretionary function. In making this finding, this Court has concluded that (1) the Government made no policy type decision not to give such warning and (2) there was readily ascertainable data available to indicate that such a danger existed. This Court will initially address this second finding.

The Government acknowledges that, at or before the sale to the public of the jeep involved in this case, it had possession and knowledge of the Cornell Aeronautical Laboratory, Inc.'s "Test and Evaluation of a ¼ Ton Light Delivery Vehicle," dated July 1971 [Cornell Report]. See Government's Responses to Plaintiffs' Request for Admission filed April 21, 1983 and May 27, 1983 (Plaintiffs' exhibits 26 and 27, respectively). Moreover, the Government admits that this Report includes the results and summary of tests of a 1969 DJ5A (the same type vehicle as the one involved in the case at bar). Further, the Government admits that the Report contains, *inter alia*, the following conclusions:

6. Compared with most passenger automobiles, the test vehicle had a very high value of center of gravity height to wheel and track ration [a factor of two difference] and thus tends to reduce its rollover immunity . . . .

7. The difference between the maximum lateral acceleration on dry surfaces (about .65g) and the equivalent lateral acceleration for rollover based on the static tests (about .75g) is a measure of the operating safety margin of the vehicle. This difference is small by modern passenger car standards and is judged to be a potential safety problem with this vehicle. (Emphasis added)

In general, it was found that the test vehicle's performance characteristics in the normal range of operation were satisfactory but that, near the limit of performance (particularly at full rated load), its performance does not compare favorably with passenger vehicles.

This Court has reviewed this Report in its entirety because the Government contends that these findings must be read in context. While these findings indicate that the jeep should not be used as a passenger vehicle because of the relatively high roll propensity to other passenger vehicles, the Report also included findings that indicate that the use to which the Postal Service intended to put the vehicles, i.e., as a light delivery truck, was a relatively safe one. However, nothing in the Report mitigates the dangers, which have been noted above, of the jeep as a passenger vehicle. Indeed, John Noettle, the expert witness who testified on behalf of the Plaintiffs, stated that the conclusion of the Cornell Report was that the DJ5 should *not* be used as a passenger vehicle.

The Postal Service also indicates its knowledge of this finding through the testimony of Crane who was the Director of the Office of Fleet Management for the Postal Service during the time that the jeep in question was sold. He had read the Cornell Report, and concluded that its findings as to the negative comparison to a passenger vehicle were irrelevant since the Postal Service used the jeeps only as light delivery trucks. He stated that the jeep "wasn't as good as a passenger car, but I felt that the statements of Cornell were satisfactory from *our* standpoint," (emphasis added). Crane Depositions, p. 25. While Crane could properly ignore the negative comparisons of these jeeps to passenger vehicles for purposes of determining their safety for use by postal employees, Crane also had responsibility in 1975 for the Postal Service's program to sell the jeeps to the general public. Yet, there is evidence in his deposition that, in carrying out the latter responsibility, he gave no consideration to the negative comparison of the jeeps to passenger vehicles to determine their safety for use by the general public. This is indicated by the following passage from Crane's deposition, at p. 28:

> ATTORNEY: Q. Was there any determination about giving buyers information about the jeeps' driving characteristics, if any?
>
> CRANE: A. No, the buyer was given the opportunity to drive the vehicle and that's all that was given to the driver. We felt that there was no need to make any special effort to explain the vehicle which had been operating satisfactorily for us.

Although the government did not give policy considerations to the data, the evidence supports the finding that there was readily ascertainable data available to the Postal Service to make the danger of the jeep's use as a

passenger car known to it. Thus, this case is distinguishable from *Barton, supra,* where no such data was presented by Plaintiffs.

Next, this Court finds that the evidence fails to show that the Government made any discretionary decision not to warn subsequent purchasers of the dangers of use of the jeep as a passenger car. The evidence, indeed, shows that no policy considerations went into this decision at all. There is no indication in the record that the Postal Service even considered this danger when putting the jeep on the market for use by the general public. Rather, they merely appear to have concluded that since *their* use of the jeep was relatively safe, no other consideration need be made. This indicates that the failure to make this warning was not a deliberate decision but rather an act of default which resulted from the shortsighted view given by the Postal Service to the jeep's safety record. This act or omission was, thus, not the nature or quality of decision that could be considered a discretionary function. It involved no consideration of political, economic or social policy. Rather, it occurred in the course of the operational task of detailing the logistics of the sale and, thus, was the mere omission of an operational task. Therefore, it is the *manner* in which the Postal Service implemented its program to sell jeeps in which it is claimed by Plaintiffs to have been negligent.

Moreover, there was no showing by the Government that a requirement to issue this warning would have threatened the feasibility of the Government's discretionary decision to sell the jeeps. There are no rules or regulations (including a consideration of the Postal Service instructions for sale of the jeep as found in Government Exhibits H, I and J) which specify any requirements on how subsequent purchasers are to be warned. Thus, there is no evidence that the limitations on warnings,

which were given to purchasers, were the result of the exercise of a statutory or regulatory function, as in cases like *Dalehite, supra*.

Rather, it appears that this case falls within the category of cases such as *Indian Towing, Smith* and *Somerset, supra,* where the Government, having exercised its discretion to perform a function, i.e., sell jeeps, then — on an operational level — failed to carry out that function free of negligence. Thus, the Government is not exempt from liability for that negligence. Moreover, the Government can be said to have improperly induced the public to rely on it to provide all necessary warnings. The purchasers of this jeep were given several types of warnings. The evidence shows that potential purchasers were warned (1) to drop back when passing, (2) about the jeep's maintenance (or lack thereof), (3) to look before backing up, via the decal on the dashboard, (4) to inspect the vehicle for patent defects, such as bad tires, leaks, etc., and (5) to read the operator's manual which is replete with warnings regarding the operation of the vehicle. As the case authority indicates, not even the Government has the discretion to leave a trap for the ignorant or unwary or to ignore their duties under state law. Having concluded that the failure to give purchasers a warning not to use the jeep as a passenger vehicle was not a discretionary function, this Court will now turn to the issue of whether the Government had a duty to give such a warning under the laws of Michigan.

VIII.

[8, 9] Under Michigan law, a seller of used goods has a duty "to future and foreseeable users of the product to exercise the reasonable care required of a reasonably prudent seller under the existing circumstances," *Johnson* v. *Purex Corp.*, 128 Mich.App. 736, 341 N.W.2d

198 (1983). This duty includes a duty to "relate information as to the character and condition of the chattel which he [seller] should recognize as necessary to enable the prospective user to realize the danger of using it," *Elkins* v. *U.S.*, 307 F.Supp. 700 (W.D. Va. 1969). This duty applies to dealers in used goods, see *Blanchard* v. *Monical Machine Co.*, 84 Mich.App. 279, 269 N.W.2d 564 (1978), as well as to one time sellers of used products, *Bevard* v. *Ajax Manufacturing Co.*, 473 F.Supp. 36 (E.D. Mich. 1979). While this Court has already noted that the "as is" disclaimer may exclude liability under a theory of implied warranty, the designation of the sale as being on an "as is" basis does not relieve the seller of his duty of care, under a theory of negligence, *Blanchard, supra*, 84 Mich.App. at 283, 269 N.W.2d 564.

The question of foreseeability is a question of fact, see *Johnson* and *Blanchard, supra*. See also *Chrite* v. *U.S.*, 754 F.2d 372 (6th Cir. Court of Appeals, 1984) where the Court noted that Michigan law only requires warnings to readily identifiable targets, or those foreseeably endangered. However, as noted in *Bevard, supra*, at 40, "if we somehow create a zone of risk or danger, then we are obligated, in law, to all those whom we could or should foresee as entering that zone."

This Court notes also that the Government cites *Allison* v. *U.S.*, 264 F.Supp. 1021 (E.D. Ill. 1967), which holds, in relevant part, that the Government is not (1) obligated under the FTCA to warn of obvious dangers, (2) under any duty to warn unless there is some reason to suppose that a warning is necessary, and (3) bound to anticipate or reasonably foresee a danger which has been occasioned by an extraordinary use of the article or the misuse of such article by a careless or incompetent person.

Since the sale of the used Postal Service jeeps is, and was, an ongoing function which involves several thousand vehicles, the Government cannot be said to be like the Defendant in *Bevard*, a one time seller of used goods. However, this program was not the primary function of the Postal Service, so that it may not necessarily be, as the Defendant in *Blanchard*, a dealer of used goods. Nevertheless, the Postal Service undoubtedly falls somewhere in between, and as noted in *Bevard*, at 40, "any seller does owe some duty to buyers and those within the foreseeable scope of risk." Thus, this Court concludes that the Postal Service owed a duty to subsequent purchasers of the used Postal Service jeeps which it sold.

The next issue is, then, whether Pace, Tina Marie Kelly and Marie Myslakowski's use of the jeep as a passenger vehicle was a foreseeable one. The Government argues that it was not. In support of this argument, they point to the fact that the vehicle was sold with only one seat and a tray up front and no rear seats. They contend further that it is awkward to enter the rear of the jeep because you have to bend over, implying that its use should have been exclusively for cargo. Moreover, Tepner and other Postal Service witnesses stated that they had never personally observed the jeep being used as a passenger vehicle.

Nonetheless, this Court concludes that such a use was reasonably foreseeable. First, it should be noted that the Government placed no restriction on who could purchase the jeeps. Indeed, the general public, not just persons in delivery businesses, were invited to purchase the vehicle. Second, the operator's manual, which purportedly accompanied all the vehicles on their sale to the public, included no reference to the DJ5A as a "truck," only as a "jeep" or "vehicle." Third, this jeep has char-

acteristics which are not very dissimilar from those of a passenger jeep with which most of the general public is familiar (pictures of the jeep are included in the operator's manual). While the DJ5A came with only one seat, an unwary user could reasonably assume that this seating arrangement was created only because the Postal Service required only one seat and not because the addition of more occupants was dangerous. Additionally, Crane admitted that he realized the jeeps would likely be put to many uses, including service as a passenger vehicle, see Crane Deposition, p. 45. Moreover, the testimony of William Thomas, General Manager of Delivery and Retail Policy Division of the Postal Service, indicated that the Postal Service sold the jeeps to the public "for any use they wanted." Under these circumstances, the Court concludes that a use of the vehicle as a passenger vehicle should have been foreseen by the Postal Service.

Nor does this Court consider the vehicle to have been so altered as to have made its use on the night of the accident a misuse. The addition of the one seat in the front was, to the unwary person, merely a cosmetic change to accommodate his/her comfort. Similarly, the seating of two persons in the back of the vehicle, like the seating of persons in the back of a station wagon, while possibly a little awkward is not so far afield from the use for which the vehicle appears reasonably suited as to make it a misuse by the unwary user.

[10] Now, this Court turns to the standard of care which the Government owed to foreseeable users of its surplus jeeps. The law in this state calls for a general standard of care to be that which a reasonably prudent seller in like circumstances would exercise. This Court believes that a warning, in writing, not to use the vehicle as a passenger vehicle, was required of a reason-

ably prudent seller under these circumstances. This holding is based on the finding that the Postal Service had knowledge of the danger of rollover (per the Cornell Report, discussed *supra*), and the reasonable foreseeability of the use of the jeep as a passenger vehicle, which created a need for the Postal Service to warn against such a use. Also, the evidence tends to show that this danger, while known to the Postal Service via the Cornell Report, was a latent danger, not obvious to the unwitting driver or occupant of such a vehicle. Thus, this Court concludes that, in breach of its duty, the Postal Service negligently failed to warn against the use of the DJ5A jeep as a passenger vehicle.

IX.

[11] The Government argues, nevertheless, that even if its duty to warn Plaintiffs has been breached, this failure was not the proximate cause of the accident. First, the Government posits that Robert Pace, owner of the jeep at the time of the accident, as well as his daughter, Renee, knew of the danger of rollover. Second, the Government urges that the rollover propensity of the jeep was not the cause of the accident which led to the Plaintiffs' losses. This Court finds both of these contentions to be without merit.

While there is conflicting evidence before this Court, it finds that the testimony of Robert Pace on this issue was most credible. Robert Pace stated that he received no warnings from Plummer, who sold him the jeep, as to its rollover propensity. Moreover, Robert Pace denied knowledge through his own observations or any other source of an unusually dangerous rollover propensity of the jeep, which he owned for only two months. Finally, Robert Pace stated that he only warned his daughter to be careful in driving the jeep, the same as he would

have warned her when driving any vehicle, and that the steering wheel on the jeep had a "little play" in it. The demeanor and openness of Robert Pace gave credibility to his testimony. Thus, this Court concludes that Plaintiffs have shown, by a preponderance of the evidence, that neither Robert Pace nor his daughter had any warning as to the rollover propensity of the jeep in question.

Similarly, on the issue of proximate cause, this Court believes that Plaintiffs have sustained their burden of proof of establishing that this rollover propensity was the cause of the accident. The testimony of witnesses to the accident is of little assistance on this point because none of them could testify conclusively whether the jeep had, or had not, begun to roll over *before* its impact with the Bell vehicle.

Thus, this Court has looked to the testimony of the two experts, each of whom reconstructed the accident. While the testimony of Wayne T. Van Wagner, expert for Defendants, was to the effect that the impact with Bell's vehicle, and not the rollover propensity of the jeep, caused the accident, this Court is more persuaded by the testimony of John Noettle, Plaintiffs' expert, who testified that the accident was caused by the high rollover propensity of the jeep. Noettle stated his belief that the jeep would have rolled over without the impact with the Bell vehicle. His experience led him to believe impacts do not usually result in the rotations that the jeep went through since the kinetic energies of the two vehicles which impact generally tends to balance each other out. He concluded that, in part, it was the addition of passengers, changing the center of gravity and reducing the rollover immunity, which caused the jeep to roll over. Noettle further opined that it would have been less likely that the occupants would have been ejected had there been no rollover. Noettle's experience

and study of this phenomenon has been extensive. Moreover, he visited the scene of the accident, examined the vehicle, studied where the jeep impacted with the Bell vehicle, and how the vehicle landed on the ground. Noettle observed that the two vehicles would not have impacted as they did had not the Pace vehicle been in a roll mode (i.e., beginning to roll over) before the impact. This Court concludes that Noettle's testimony, as well as his knowledge and training in this field, support the Plaintiffs' contention that the rollover propensity of the jeep caused the jeep to react as it did and, thus, caused the ejection and such violent damage to its occupants who are represented by the Plaintiffs in this case. This Court also finds that the Plaintiffs' injuries were proximately caused by the Government's failure to warn them of the rollover danger of the jeep when used as a passenger vehicle.

This Court cannot attach much weight to the Government's final argument that the lack of warning was not the proximate cause of the accident because it would not have been seen by the Pace vehicle in any event. In support of this, the Government argues that since the jeep's dashboard and the warning thereon regarding backing up had been carpeted over, any warning regarding rollover would have been similarly obscured by the carpeting. This argument, however, calls for too much speculation to be given validity. One must assume, first, that the warning could have only been placed on the dashboard, and, secondly, that it would have been given as little significance as the other warning by the owner who allowed the carpeting to be installed. No evidence indicates that such assumptions would be anything but speculative, and, thus, this Court declines to adopt them. Moreover, there is no evidence that Robert and Renee Pace, had they been warned not to use the jeep as a passenger vehicle, would have ignored it.

X.

[12, 13] In considering the damages owing to Plaintiffs in this matter, the Court has considered, with respect to Tina Marie Kelly, (1) the pain and suffering which she experienced from the time of the accident until the time of her death shortly thereafter, (2) the grief to her family and (3) the resultant burdens which they bore, and continue to bear from having to cope with that grief. With respect to Marie Myslakowski, this Court has considered her testimony, the testimony of her father, the deposition testimony of her two treating physicians, Drs. Mary Ann Guidice and Bernard Bast. These doctors' support the conclusion that Myslakowski has been suffering, and continues to suffer, from a type of brain damage known as closedhead injury, along with several physical injuries which she incurred in the accident. She was hospitalized for approximately two and one half months, and undertook extensive therapy to help her memory and walking. She has improved significantly since October 1979, but continues to suffer from a memory deficit.

On the basis of these damages, the Court awards the Plaintiff, Betty Galanos, as representative of the Estate of Tina Marie Kelly, the sum of $550,000.00, exclusive of costs, interest and attorney fees, and the Plaintiff, Matt Myslakowski, individually and as next friend of Marie Myslakowski, the sum of $350,000.00, exclusive of costs, interest and attorney fees.

In summation, this Court finds the Government liable to the Plaintiffs in the amounts as set forth above for its negligence in causing the losses which Plaintiffs have suffered.

IT IS SO ORDERED.

APPENDIX C

28 U.S.C. § 2680(a)

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to —

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * *

APPENDIX D

MCLA 440.2316

440.2316. Exclusion or modification of warranties

Sec. 2316. (1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence (section 2202)[1] negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2):

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

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[1] Section 440.2202.

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade; and

(d) with respect to the sale of cattle, hogs, or sheep, there is no implied warranty that the cattle, hogs, or sheep are free from disease, if the seller shows that all state and federal law concerning animal health has been satisfied.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this article on liquidation or limitation of damages and on contractual modification of remedy (sections 2718 and 2719).[2]

Amended by P.A.1981, No. 101, § 1, Imd. Eff. July 15.

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[2] Sections 440.2718 and 440.2719.